HINDU LAW
OF
INHERITANCE

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(AN ANTHROPOLOGICAL STUDY)

by

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PREFACE

THE writer of this book had not been a student of Law. He had busied himself in the study of Indian Anthropology and Sociology. As such, he in his investigations of the cultural history of India, has found out, that apart from the priestly overclouding of the history of cultural achievement of the Indo-Aryan race, overshadowing of the same has also taken place under the aegis of foreign rulers. We have learnt to interpret our culture and cultural goods from the angle of view of the latter. We, in the days of captivity, have been guided by the savants of the ruling class who acted as the high priests of our new awakening. Truly, Sri Aurobinda, while dwelling on the topic of "The renaissance of India", described our intellectuals of the early part of the nineteenth century in the following pithy saying: "Intensively patriotic in motive they were yet denationalized in their mental attitude. They admitted practically, if not in set opinion, the Occidental view of our past culture.....and their governing ideal was borrowed from the West or at least centrally inspired by the purely Western spirit and types of their education".

Thus from the Rigveda downwards to the immediate past, the interpretation of our cultural goods as given by these foreign high-priests, have been regarded as "Holy of Holies" which no one can trespass. It is not impudent to say that our savants were influenced by the new intoxication of Occidental Culture. Of course, it was unavoidable at the first flush of renaissance. But at present this elation is abating, thanks to the accumulating researches of the present-day Indian scholars.

In the course of the writer's researches, he had to combat many notions which have been imbedded in the Indian mind for a long time. He had to fight not only the idols of the tribes and markets, but also the new ones. One of these neo-idols of the market is Sir Heury Sumner Maine's theory regarding primitive society. Maine has applied his theory in his investigation of the socio-economic condition of ancient Indian society.

The significance of his theory led him to say, that, he had found substantiation of his theory in Indian village life and in law. The writer in the course of his investigation, in the Indian cultural history has tried to probe into the truth of this claim. The results of his researches have been put down in several books dealing with society, land-economics, and finally law. Thus, following the trail of Maine's theory, he was driven to study the Origin of Indian law. Strangly, it was found out that some of the earlier writers of Indian legal history have based their writings on the hypotheses of Morgan and Maine. But while reading the history of the cultural evolution of India, we must not forget that the present-day anthropologists and the archaeologists say that civilization never had a unilineal development the world over. It is even admitted by Frederick Engels that the latter-day anthropologists are not accepting the dictum of Morgan. Humanity never had a stereotyped evolution in its career of advancement. This we must bear in mind when we apply ourselves to Indian history. Here, it must be added that a printed copy of "The Hindu Succession Act, 1956" that was passed by the Indian Parliament and published in the Gazette of India Extraordinary Part II, Sec; I dated 18. 6. '56 came in the hand of the writer on the eve of the completion of the printing of the book. Hence, no mention of the Act had been possible within the body of the text. But *en passant,* we may say that, though the Act fuses both the Mitakshara and Dayabhaga systems, nevertheless the Act does not unify all the legal systems, customary or written into one "Hindu" code. Though the Act has given females the right in paternal property and acknowledges her as full owner of the same, and also gives absolute right to the reversioners of the paternal property, yet the Mitakshara joint-family system has been left untouched. Further, survivorship in a Mitakshara Co-percenary property has been retained. Thus the residue of the tribal features of Mitakshara still remains there. Again, the Marmakkattayam and Aliyasantana laws connected with matriarchal system have been kept up. Further, the separateness of Tawad, Tavazhi, Kuttuva, Kevaru or Illom properties which are the relics of feudalism, is maintained though they are brought within the

perview of the Act. Again, the Act does not touch certain properties covered by the agreement entered into by the Rulers of any Indian State with the Government of India, and the Palace fund administered by a Board appointed by the Maharaja of Cochin, etc.

Lastly, in case the heirs mentioned in the Schedule fail, then the reversionership will devolve first to the agnates, failing, the cognates. This keeps up the spirit of old Mitakshara rule and abolishes the *Sapinda* i.e., the propinquity theory of Dayabhaga. Hence it should he said, that in the matter of laying stress on agnatic succession, the old spirit of preferring the succession within the sagotra or clan is preserved. Thus some similarity with the German parentalic system is discerned here. The liberalism of Dayabhaga is dispensed with.

Previously, the members of the Ishmaelite sects of Muhammedans used to retain Mitakshara rule of succession, but henceforth they are deprived of that opportunity. Again, by disallowing interest in the ancestral property to the descendants of Hindu converts to another religion, the Act seems to go against the National Constitution, as the Article 25, guarantees religious rights and freedom of conscience. Formerly the *Lex Loci* Act protected the property of the converts. It is on record at least in Bengal, that the Hindu convert to Muhammedanism had retained sevaitship of the ancestral temple, and the descendant of a convert had retained the *Brahmasya* right to land given by a quandom rajah. Now they will be deprived of their proprietary right. This disqualification not only betrays illiberlism but accentuates "Two-nation" theory as well, as the Moslems of India are made to recede more and more from the parent stock.

Finally, it is to be said that, we do not know, how much of rationality, liberty and equity is implemented in this Act, and we leave it to the juristconsults to decide. But this much can be said with impunity that the Act is neither "Hindu" nor "National". It is a makeshift to meet the historical-materialistic demand of the rising bourgeoisie governed by Mitakshara School, who are rapidly growing as a commercial class. The industrilization of India demands the mobility of capital cooped up in the system of common ownership of the family property. The

breaking of this system is a historical necessity, and the Act has done it admirably. On this account our plea for a national law stands.

Here it is to be stated that the writer studied for four years the Indian law-texts that were available to him, and finally made a comparative study of legal histories of foreign laws from the library of the Law College of the Calcutta University .The result of his investigation has been put down in this book, the completion of which took place in 1948. But as usual, the manuscript went abegging for publication for several years at the doors of the publishers of law-books and others, till at last it was kindly taken up by the present publishers who have published several other books of the writer. The author cannot thank them adequately. The author is beholden to them for their sympathy. In this connection the author thanks Prof. Annada Charan Karkoon, M.A., B.L. the Vice-Principal of the Law College for kindly giving permission to the writer to read books from the College library. At the same time he owes a debt of gratitude to Prof. Satkari Mitra M.A., B.L. for kindly making a fair copy of the manuscript for the press, and giving necessary suggestions, and also to Sri Upendra Kumar Datta, for reading the proofs of the book with painstaking care. Finally he owes a debt of gratitude to Brahmachari Amar Chaitanya for personally supervising the publication of the book.

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1

CORPORATE LIFE IN ANCIENT INDIA

In the Atharva-Veda we find that it exhorted people to co-operate with each other, as it said: "Following your leader, of the same mind, do you not hold yourself apart! Do you come here, co-operating, going along the same wagon-pole, speaking agreeably to one another! I render you of the same aim, of the same mind. Identical shall be your drink, in common shall be your share of food! I yoke you together in the same traces....." (3.30).[1]

It seems this is a pious wish and not a statement of fact. The last hymn of the Rig-Veda (X. 191) was composed by the poet Sambulan, and it contains four Riks. The god invoked in the last three Riks had been "Consciousness" or "United Opinion". In the second Rik the poet exclaims, "Oh reciters of hymns! You be united, pronounce the hymn unitedly. Your mind be of the same opinion with one another. The third Rik says, "Let the pronunciation of the 'mantras' of the priests be similar.....let their mind, picture and all be of the same nature; Oh ye priests! I am initiating you with the same 'mantra', and sacrificing with you all". The fourth and last Rik says, "Let your desires be the same, heart be the same, mind be the same; let you be of one opinion in every respect."

In this hymn we find that the Rishi exhorted the priests to be of one opinion. The hymns quoted from the two Vedas do not lead us to accept the belief that *tribal communism* was extant at that time. Surely, exhortations for co-operation and for unity of purpose were the desiderata of the age when blood-feud and *Lex Talionis* were the normal orders of the tribes. Further, the external evidences of the Rig-Veda show that the society of that period was strongly individualistic. Any way, we do not

1. Bloomfield's translation in S. B. E. Vol. XLII, p. 134.

get any inkling of communistic trends in the Sanskrit religious texts. It may be that co-operative principles were being followed in different stages of evolution of some of the Indo-Aryan tribes.

The record of the Macedonian Nearchus regarding collective farming may have reference to the above-mentioned co-operative system that appeared to his eyes on the North-West Frontier of India. Hence, let us inquire more minutely in the Hindu institutions of the old if we find any trace of the things that are alleged to exist. It is known to the inquirers of Indology that the Hindus from time immemorial have got the "gotra" system like the Greek 'genes' and the Roman 'gentes'. Whatever be the meaning ascribed to it by the latter-day priesthood, we understand it in the sense expressed in the Sanskrit literature as the old English word 'clan'. According to the old Indian jurists, this term comprises two other terms—"Sapinda" and "Samanodaka".[2] Now-a-days, Sapinda means those whose 'pinda' that is, oblation of food to the ancestors are common. Marriage between Sapinda subjects are interdicted on account of consanguinity of blood. That shuts out endogamy within the clan who have common ancestry in the male line. By the expression founder of a "gotra" is to be understood the founder of a family. From the Sanskrit texts we find clearly that each "gotra" branched off into different lines establishing collateral families. Thus the founders of new families are called *Pravaras* of the original clan. Hence each "gotra" has got various Pravaras. Again, by comparing the "Gotras" and "Pravaras" that are extant to-day we find that the Pravaras of one family has become the Gotra of another and vice versa.

Further, from the Puranas we find that some of the descendants of these gotra-founders entered the other Varnas. Naturally, therefore, we can conclude that the Gotra and Pravara institutions have got nothing mystic and specific traits in them. They have passed through the same evolution as in the case of other peoples who are still in tribal stages, viz., the Afghans, the Arabs,

2. "Vrihat-Manu" cited in Mitakshara, 2-5, 6.

etc., or the ancient classical peoples. From the testimonies of the Puranas we can draw the conclusion that 'gotra' was the original clan designation, and when some of the members of these clans entered the folds of other varnas they carried their patronymics with them. That is the reason why we find gotra-names to be common with various upper castes of the present-day Hindus. The case of the gotra of Raja Lokenath of Tripura (Bengal) of mediaeval days is an example of it. The pretension of the priesthood that all non-Brahmans have got their "gotras" from their Brahman priests is not substantiated from the Puranas.

Again, we find strange "gotras" among the Brahmans, viz., Lauhitya,[3] Asva, Baji,[4] Kamboja (Matsya 195.18), Mrigay, Vinayalakshana, Sairindhri, Jalandhara (Vishnu 199. 15-18), etc. It seems that these "gotras" have sprung up as the priests evolving from the local regions took the names of the localities as their patronymics. Again, some of these names ('Asva' or 'Baji' which means horse) give rise to the suspicion of being of totemistic origin. Further, not being able to provide themselves with "rishi" patronymics they concocted fanciful poetic names (Vinayalakshana) or occupational names (Sairindhri). Any way, these strange "gotras" must have been concocted in latter day evolution of new clans and sects of Brahmans in the social history of India. As regards the concocted gotras of some of the so-called lower castes of the Hindus, the semi-Hindus and aboriginal tribes they are frankly totemistic, viz., *Arasina* (turmeric) of the non-Brahman Agasa caste of Mysore,[5] *Lâmb* of the aboriginal Kherias of Singbhum (Bihar), *Nilgai* (a bovine species), *Wild goose, Falcon, Grass, Betel-leaf* of the Santals.[6] The Kacharis of Assam have got *Heaven, Earth, Tiger, Grass, Bamboo, Squirrel, Saja Tree,* etc.[7] Again, with the acceptance of Hinduism, gotras of some of the tribes are being

3. Epigraphica Indica: Vol. III, No. 70.
4. Ibid: Vol. X, No. 15.
5. Census of India: Vol. V. Mysore. Part I, Reports—pp. 507-512.
6. H. Risley: "Tribes and Castes of Bengal," Vol. I.
7. Sydney Endle: "The Cacharis", pp. 6-35.

given the semblance of Rishi-names, viz., *Sarabhanga, Goose (Hamsa-rishi), Mândilya, Bird-Suka.* A group of Santals or Kherwals who live in Bengal and have accepted Vaishnavism of the Ramayet sect have got these 'gotras'.[8]

Again, there is another sort of gotra-designation called *Dvyamushyana-gotra.* This means double gotra. It becomes manifest that when a man is adopted by some body he carries his original and adopted gotras together. There are illustrations of such sort of gotras in the texts[9] and in epigraphic inscriptions.[10] The Mitakshara text speaks of this kind of men with double gotras.

Thus the Gotra and Pravara systems have got nothing strange in them. Nor are they peculiar Hindu institutions giving rise to the claim of peculiarity or special psychic character of Hindu life.

Along with the Gotra system is connected some other institutions, viz., *Sagotra, Sapinda, Sâkulya, Samânodaka.* The word "Sapinda" is to be found as early as the post-vedic Gautama (14) and Apastamba (9.21) Dharmasutras. "Sapinda" is an agnatic relationship extending up to the seventh generation. In the Hindu society, observance of mourning on the death of an agnate is obligatory within this limit. Beyond this limit people may be of Sagotra origin but not kindreds. Vrihat-Manu cited in Mitakshara (2. 5, 6) says, "The relation of the Sapindas or kindreds connected by funeral oblation ceases with the seventh person; and that of Samânodaka or those connected by a common libation of water, extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends. This is signified by 'Gotra' or the relation of family name". Again, Manu-Smriti (V. 69) says, "Sapinda relationship ceases at the seventh degree, and when there is consciousness that so-

8. B. N. Datta: "Traces of totemism in some tribes and castes of North-Eastern India."—Man in India—Vol. 13-1933.
9. Vide Annotation to Chhandogya Upanishad—by Sankaracharya.
10. Vide Pamulavaka copper-plate grant of Vijayaditya VII in Q. I. Andhra Historical Society. July, 1927.

and-so was born in the family, then he is counted as a Samânodaka".

From the above-mentioned sayings of Vrihat-Manu and Manu, we get the idea that the "Sapindas" and "Samânodakas" as "gotrajas" are "sagotras", that is, have common descent in the patrilineal line. Hence they are agnates. But the mediæval Nibandha-writer Nanda Pandit (1633 A.D.) says that the "Sapindas" may or may not belong to the same general family. As regards the Sâkulyas, they are the children of the fifth ancestor, hence, the fifth descendant. On the other hand, the lexicon Amarakosa says that persons of common[11] descent for seven generations are *Sapinda* and *Sanâvi* (*Manushya Varga*). Similarly, Jimutavahana, the reputed founder of Bengal School of Hindu Law, quoting from Markandeya Purana says, that "Sapinda" relationship extends to the seventh generation (Dayabhaga, 126).

The late Indian Jurist Golap Chandra Sarkar Sastri has opined that the word "Gotra" is derived from the Sanskrit roots, *go* (cow) and *tra* (to save). It means what protects the cow, that is, pasturage. As regards the word "Samânodaka" he derives it from *udaka* (water or *reservoir*).[12] Hence by "Samânodaka" is meant he who uses the water in common. As regards "Sâkulya" he derives it from the root *kula* which he says is similar to the Latin *"colo"* meaning "to cultivate". Hence it means the land for cultivation; and the word "pinda" means "food".[13] From these derivations he infers that by the expressions "Sagotra" and "Samanodaka" are meant those collection of men whose pastures and watering places were used for general purpose or held in common. By "Sâkulya" he meant those who cultivated collectively and by "Sapinda" he meant those who had a common mess. Further, his view that the saying of Baudhayana quoted in

11. R. Sarbadhikari: "The Principles of he Hindu Law of Inheritance", 2nd Ed., pp. 22, 326-27.
12. "Udaka" in Sanskrit generally means water. It is nowhere used in the sense of reservoir or pond. It is the same as classical Greek word "Udar" which means water.
13. G. C. Sarkar Sastri: "A Treatise on Hindu Law", 5th Ed. 1924. pp. 107-108.

Dayabhaga (125), that "the undivided *Dâyâdas* (agnates or relations) are Sapindas, while the divided *Dâyâdas* are *Sâkulyas*" hints at this explanation. Here it should be noted that by undivided Dâyâdas, Baudhâyana meant great grand-father, grand-father, father, oneself, uterine brother, sons by the wife of the same varna, grandson and great grandson. The divided Dâyâdas are Sâkulyas, that is, collateral relations (Dâyabhâga, 125).

From these definitions of the eminent Jurist we find, here, that like some other text book writers on Hindu Law, Maine's theories regarding Hindu social institutions were at work with some earlier writers. This gives rise to the question: Did the Indo-Aryans in their pre-Vedic or Vedic ages live together for seven generations under the same roof having a common board? Or the terms connected with "Sagotra" have connections with the "cult of the dead" which we find in the Vedic literature culminating in post-Vedic compulsory observance of "Srâdhha" ceremony of the dead person which is the continuation of the observance of offering oblation to the manes (spirits of the departed souls). And this has been an old Indo-European custom.

But we find that the Rig-Veda speaks of private property in land and nowhere of communal ownership of land. We also see that property used to be divided[13A] among the sons, the unmarried daughter getting a share of it (RV. VIII. 17.7). Even we read that brothers are refusing to share the ancestral properties with the sister (II. 31.2). Hence the word "Sapinda" must have had other meaning than that ascribed to it by some writers now-a-days. (The Brahman priests of to-day understand by this term only the agnates who are liable to joint observance of mourning).

Then comes the meaning of the word "Sâkulya". The Rig-Veda sâys that the head of a family is called *"Kulapa"* (X. 179.2). Hence "Sâkulya" may mean, of the same *Kula*, that is, clan of the family but separated, according to Baudhâyana.

13A. Vide B. N. Datta: 'Vedic Ethnology' in "Dialectics of Hindu Ritualism, Pt. I.

He says, "The sharers of divided oblations, they call Sâkulyas" (Baudh. I V. 11, 9-10). In annotating this passage of Baudhâyana, the Viramitrodaya says, "The three ancestors beginning with the great great-grand father and the three descendants ending with the great great grandson, that is, the three beginning with the fifth on both sides, who partake of divided oblations, and are not connected through the same *pinda*, are called by the sage *Sâkulyas* in as much as they are only connected through the *kula* or family." (III-1. 11.)[14] Jimutavahana opines likewise (12.5).

From these definitions we see that those who have sprung from the same family yet as collaterals live separately cannot have cultivation in common. On this account any sort of communism cannot be implied by this term. The Brâhman priests of to-day do not utter the terms "Sâkulya" and "Samânodaka" in their recitals of *mantras* during the performance of a rite. They say the meaning thereof is not clear and therefore they have got no application in modern times.

The modern Indian jurists,[15] by churning the old Smriti texts have fixed the meaning of these terms thus: The "Gotraja" which is the nearest approximate to the Roman term 'Gentile' includes the Sapindas and Samânodakas. As for *Vhinna gotra* Sapindas, that is, Sapindas sprung from different families but connected by consanguinity are called *Bandhus*, that is, cognates. And from the above-mentioned saying of Vrihat-Manu and Manu we get the idea that the Sapindas other than *bhinna gotras* and *Samânodakas* are *Gotrajas*, that is have common patrilineal descent. Hence they are agnates. These two groups stand in exogamous marital relation to each other; because from the Purânas we read the interdiction of marriage between persons of the same gotra and pravara.

Regarding the abovementioned theories of Maine's School, a recent Indian jurist J. Ghosh says, "When learned European writers say that Sapindas meant those "having common food"

14. Setlur's edition, 391-2.
15. R. Sarbadhikari: "The Principles of Hindu Law of Inheritance", 2nd. Ed. 1922, pp. 326-327.

and Samanodakas, those "having water in common" they say so misled by the preconceived idea without reference to facts. The text of the ancient sage Satâtapa, cited in this section, speaks of separated brothers of one Pinda. By Pinda, therefore, body and not food, was meant. Then the old Sapinda relationship in the case of descendants through mothers of different castes, spoken of by the Rishis (sages), leaves no room for doubt that in ancient times *Pinda* meant body, and not food. .....Samânodaka meant connection through offering of water."[16] Then he further says, "This offering of water to remote ancestors and their male descendants, is an ancient custom of all the Aryan races, and had more to do with spirit worship than with the enjoyment of a common reservoir of water."[17]

Here it should be noted that the ancient writer Devala has said, "(up to the third degree) the members of the family are of the same body" (Devala cited in Ratnâkar). Further, the late mediæval writer Vijnanesvara has said on commentary of Jag. I. 52 that "wherever the word *Sapinda* occurred, it denoted either directly or mediately connections with particles of one body, that is, blood relationship with ancestor."[18] Further, he clearly expressed the term thus: "He should marry a girl who is non-Sapinda with himself. She is called his Sapinda who has particles of the body of some ancestor, etc. in common with him.....Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in Sapinda relationship to his father because of particles of his father's body having entered his."[19]

Finally, we quote here a Rik from the Rig-Veda which clearly hints at the socio-economic situation of the time: "He who has got one portion of property worships the man who has got two portions; he who has got two portions follows the person who has got three portions. The man with four portions takes his

16-17. J. C. Ghosh: "The Principles of Hindu Law", Vol. I, p. 181.
18. Kane: Op. cit., Vol. I.
19. Quoted from Mayne's "Treatise on Hindu Law and Usage"—10th Ed., 1938, p. 156.

position over them. In this way, there is a serial class organization in the front and behind. A man with small riches worships a man with larger riches." (X. 117. 8.). Thus there is no allusion of Communism or Joint-Ownership in any sort of property in this wailing. And this is true even to-day.

As regards the undivided *Dâyâdas* defined by Baudhâyana, we surmise that grouping of one family under the same roof had been the basis of future joint-family system. The head of the family was called the *Grahapati*. As India had not yet evolved "One-family" system, naturally a man with his descendants lived under the same roof conjointly till the cousins (collaterals) separated themselves after the demise of the head of the family. It is on record in the Smritis that the members a family may divide and again may rejoin themselves in one family. This was called *Samsristi*. Thus a corporate life based on joint-family system has existed in India from the Vedic days.

II

SOCIOLOGICAL ASPECT OF HINDU LAW

A. HISTORICAL PERSPECTIVE

Now we shall trace the influence of alleged communism in law. It is said that the Hindu Law is claimed to be based on Revelation. But the Veda itself does not deal with law. Only in post-Vedic *Sutras* and in still later Smritis that we find discussions on *Vyabahara*, i.e., law. Thus the Hindu Law developed as a part of religion. Of course the latter day Smriti-legislators acknowledged that custom is one of the sources of their laws. But there had been differences among the modern jurists in the matter of origin of this law. Regarding this controversy the jurist Mayne says, that the scholars who have busied themselves on the subject have found out that the warring views are not correct.[1] Hence he says, "Hindu Law is the law of the Smritis as expounded in the Sanskrit commentaries and digests which as modified and supplemented by custom, is administered by the Courts".[2] On the contrary, a still later jurist J. C. Ghosh says, "The main position of my book is that Hindu Law is based on the Smritis and that it is an error to consider that the commentators embodied the customary law of their respective provinces. The commentators expressly repudiated that position".[3] It is worth while to make a minute investigation on the evolution of the Hindu legal institutions by comparing the texts extant among the various Hindu sects as well as the epigraphic records so far discovered before we pass a verdict in this mater.[4] The text-book writers on Hindu Law during

1-2. J. D. Mayne & Iyengar: "Treatise on Hindu Law and Usage"—10th Ed., 1938.

3. J. C. Ghosh: "The Principles of Hindu Law" Vol. I, 1917. Preface—p. V.

4. About the epigraphic records on Land Legislation, see B. N. Datta: "Dialectics of Indian Land-Economics".

the British regime seem to have passed over this side of the history of Hindu Law, and have satisfied themselves only by quoting Sanskrit texts.

On this account the subject in question being a vast one, and there being books in plenty that deal with the nature and origin of the Hindu Law, we shall inquire here only about the trace of any collectivism in property. Hence we shall follow the development of the *law of Inheritance* among the Hindus.

Let us go through the Scripture and the Smritis regarding the matter in question here. We see that the Rig Veda speaks about the individual proprietorship of a log of wood (X. 155. 3). Then the gradation of rich people are talked about (X. 117. 8). Then the text speaks of the sons dividing father's property after the demise of the father (III. 51. 2.). Again, it speaks of unmarried daughter staying in father's home and asking for a share of father's property (II. 17. 7). Also the text speaks of the sons obtaining wealth from their old father (I. 70. 5). Further it says, "our kinsmen do not get share of our food (*annam*)" (I. 71. 7).

Again the Veda says, "Oh Rudra! do not kill the oldest amongst us, do not kill the boy; do not kill the person who gives birth to a son; do not kill the child in the womb; do not kill our father, our mother. Do not strike on our dear body." (I. 114. 7). Here the poet prays for the safety of his family which probably consists of three generations. These are the "undivided kinsmen" as mentioned by Baudhâyana and others of later days. Here we do not get any idea of a clan communism but the hint of the future joint-family system.

The next Rik says, "Oh Rudra! Do not commit violence (himsa) to our son; do not commit violence to his son; do not commit violence to anybody else amongst us; do not commit violence to our cow and horse." (I. 114. 8). Here three generations are clearly spoken of. Both these Riks allude to a Grahapati and his family. The next Rik says, "As the shepherd (in the evening returns the animals to their owners), Oh Rudra! Likewise I return your litany to you." (I. 114. 9.). Again, in another place, the poet-rishi, praying to the gods Asvi twins, says, "Let not our milch-cows being separated from their calves go astray

to some undesirable place." (1. 120. 8). In these two Riks, private proprietorship in cattle is spoken of. Again, a *rishi* says, "Oh god Sabita! Do such a thing that makes us not feel ashamed. For this reason, you are worshipped in the houses of rich people." (X. 93. 9). In another Rik we find individualism strongly expressed. The *rishi* says, "Oh Asura Indra! I am Vasra, taking plently of *homa* goods with me I have come to you on foot. Coming (here) you bless this person, i.e. me; give me food, power and best house, in short, everything." (X. 99. 12). Again, a Rik says, "A begotten son (of a man) does not give paternal wealth to his sister. He gets her married." (III. 31. 2.).

In these Rig-Vedic quotations we find that private property was an established institution of the time. We also find that there were class-divisions in society. The sons used to inherit their father's property after his demise and used to divide it among themselves. Also we find that an unmarried daughter gets a share of her father's property. We have also seen that a brother does not partition his paternal property with his married sister. The Rik of the same *sukta* says, "The sonless father honouring the son-in-law, goes to the grandson born of the daughter. The sonless father lives pleasantly hoping that the daughter will give birth to a son". (III. 31. 1.). Thus it is evident that the grandson born of a daughter is as good for religious and other functions as the son's son of a man. Explaining the sentences the Nirukta-writer Yaska says, "The wise man holds that both children (i.e. the son and the daughter) have the right of inheritance without any distinction whatsoever." (6-5.). Further in order to make the point stronger Yaska quotes a *sloka* of Manu and says, "Manu declares that according to law the right of inheritance belongs both to the son and the daughter".[5] But this *sloka* is not to be found in the extant Manu-Smriti. Yet, from the question of Yaska we can surmise that there was a time when the son and the daughter and their sons stood on the same footing in the eye of law and religious functions. Again, we find strong individualistic tendency in man's desires for house

5. Vide L. Sarup's translation: p. 40.

and property. Taking all these evidences together, we find that there was neither tribal nor clan collectivism nor communism nor common ownership of family property. Individualism in wealth and society was rampant in Vedic days.

Coming down to post-Rig-Vedic age we find, that Taittiriya Samhita says, "They distinguish the eldest son by the heritage".[6] But there is no allusion of this distinction in the Rig-Veda. In the Brahmana period of the Vedic age we find that the Taittiriya Brahmana says: "Manu divided his wealth among his sons." Again it says, "Therefore they distinguish the eldest by (an additional share of the property). (Taittiriya Brahmana III. 1: 9. 4 and II. 5. 2. 7. 1). Thus also from the post-Rig-Vedic age we find, that there was no common ownership in father's property as the sons used to divide father's property among themselves. At the same time we find that the right of *Primogeniture* was developed in that period.

Then we come to Yaska,[7] the champion of Conservatism in post-Vedic Age. As regards *inheritance* he says thus: "The offspring belongs to the begetter only. (Chap. III. 1). The treasure of the stranger is indeed to be avoided, i.e. not to be approached: *Rekhna* is a synonym of wealth; it is left by the deceased. May we be masters of eternal wealth, as of the parental property. (The child) begotten by another is no son; he is so far for the fool (only); 'Oh Agni, do not corrupt our path, (RV. VII. 4. 7.) Durgâ[8] the annotator remarks that the stanza forms a part of a dialogue between Agni and Vasishtha (RV. 7 4.). The latter implored the former to grant him a son, as all his sons had been killed. The former told him to get a son by adoption or purchase, etc; whereupon he denounced all but the legitimate son" (III. 2.). "The stranger, however delightful, should not be adopted, begotten in another's womb; he should not be regarded (as one's own) even in thought. To his own abode he certainly goes back.....'Let the new (here),

6. Quoted by Sarbadhikari: p. 173.
7. Vide translation of the text, "Nirukta" by L. Sarup.
8. The annotator of Yaska who lived in the fourteenth century in Jammu.

impetuous and irresistible, come to us, he alone is (the real) son'." (RV. 7. 4. 8.).

"Now (some law givers) cite the following stanza in support of a daughter's right to inheritance, others hold (that it is to be applied) in support of a son's right to inheritance." (III. 3).

"The husband admits that he (the father) shall obtain a grandson from the daughter, the wiseman, honouring the process of the second rite." "The husband admits the daughter's right to be appointed as a son, with regard to (the discharge of) the duties of an offspring. He has obtained a grandson, i.e., the son of the daughter is the grandson."

"In the beginning of the creation, Manu, the self-existent, declared himself that according to law the right of inheritance belongs to both children (the son and the daughter) without any distinction (whatsoever)".[9] 'Not the daughters' say some (of the law-givers). It is known therefore that the man has the right to inheritance, but not the woman: therefore they abandon a woman as soon as she is born, but not the man:[10] Women are given away, sold, and abandoned, but not the man. 'The man also' retort others, 'as is seen in the case of Sunahsepa.' According to another view, this refers to a maiden who has no brother. According to the annotator Durga, sale and abandonment mean marriage by purchase and capture. It may also refer to slavery. "They stand with their path obstructed like women who have no brother." (Atharva Veda 1. 17. 1.).

"They stand like women who have no brother and whose path is obstructed with regard to procreation and the offering of the sacrificial cake." "With these words the simile implies the prohibition of marrying a brotherless maiden." (III. 4).

"There are four similes: One should not marry a brotherless maiden, for his (the husband's) son belongs to him (to the father of the girl).[11] From this, the prohibition of marrying

9. This sloka is not found in the extant Manu Smriti. But similar view is expressed in IX, 123, 130, 139.
10. Vide Maitreyani Samhita, IV, 1. 4; IV, 7. 9; Taittirya Samhita. VI, 5. 8. 27; VI, 5. 10. 3.
11. The quotation is untraced.

a brotherless maiden and the father's right to appoint his daughter as a son are evident..... Now (some law-givers) cite the following stanza (in support) of their denial of a daughter's right to inheritance. Some are of opinion that the major share belongs to the (appointed) daughter." (III. 5.). "The legitimate son did not leave wealth for his sister. He made her the place of depositing the seed of her husband."

"Where are you at night, where during the day? Oh Asvins, where do you get your necessary things, where do you dwell? who puts you to bed in a dwelling-place as a widow a husband's brother; and a bride a bridegroom" (R.V. X 40. 2)..... "From what root is *devara* derived? (He is) so-called (because) he is the second husband." (III. 15).

From this explanation of Yaska about the usage regarding inheritance in the Vedic age we find the following salient points: (1) A man has been the master of his own wealth as well as his parental one. (2) Adoption was not liked, but adoption from one sib (*gotra*) to another used to take place as in the case of Sunahsepa.[12] (3) A sonless man used to take his married daughter as his son. This is what the latter-day *Smritis* called *putrika*. The son of this daughter was called in the *Smritis* as *putrikaputra*. (4) According to the primeval Manu, the law-giver, both the son and the daughter had the right of inheritance in paternal property. This has been also the custom of the Iranians, the first cousins of the Vedic people, since the Kianian period, that is, the time when Zoroaster arose. But this primeval custom has been challenged by some of the ancient sages. In Rig-Veda itself we do not find any reference to this saying. (5) As regards the saying: "Women are given away, sold and abandoned", the annotation of Durga seems to have been made according to the setting of his time. The sentence may refer to selling to slavery and destruction of life by some form of infanticide. In this connection we are reminded of a peculiar custom of the ancient Germans. Huebner discussing about the custom of adoption among the ancient Germans says: "In the primitive law, unlike that of to-day, the natural fact of birth was

12. Also in the case of Saunaka.

by no means sufficient basis for the aquisition of full capacity for rights. Whether the child should be adopted into the family of its father, and thereby became a member of the legal community, depended, moreover, according to Germanic law, upon the father's will. He might expose it, i.e. disown it".[13] In this matter Grimm says, "The new-born child lies on the floor until the father declares whether he will or will not let it live. If yes, he takes it up, or orders it to be taken up; it seems that the term for midwife (Hebamme) comes from this act (Aufheben =to raise)".[14]

Again Huebner says, "The right of exposure was gone so soon as the first act in care of the child had been done".[15] In this matter says Grimm, "A child exposed must not yet have tasted anything whatever, a drop of milk or of honey assured it life".[16] Here we recall to mind that putting some drops of honey in the mouth of a new-born babe is still the custom of the Hindus. Finally Huebner says, "When the right of exposure disappeared, under the influence of Christianity the necessity of a formal adoption of the child into the family disappeared with it".[17]

In this pre-Christian Germanic custom we get an explanation of the Vedic saying quoted by Yaska which had been a faint echo of the custom of the primordial Indo-Europeans. Only the post-Vedic scholars forgetting the true import of the pre-Vedic custom wrangled it.

From the Vedic and Germanic customs here alluded to, we understand that in primitive time a strong male person was more dear to the sib than a female member, hence this mode of exposure or abandonment was resorted to. We learn from history that the ancient Persians used to resort to this custom. Yaska only echoes the fact of an ancient custom. (6) There had been a disinclination to marry a brotherless girl as her son will go to the father of the girl (*putrikaputra*), thereby the husband's sib would lose an active male member; a brother did not share his patrimony with his sister, he married her to a man; a widow used to be married to her husband's younger brother. Thus

13. 15. 17. Huebner: "A History of Germanic Private Law:" pp. 43-44.
14. 16. J. Grimm: "Rechts altertuemer", I. 627, 630.

Junior Levirate was in vogue. In post-Vedic period there had been a heated discussion regarding the equal right of a daughter in her father's property. But conservatism won the day. The property was kept within the sib, i.e., within agnatic line. It is thereby clear that the Indo-Aryan tribes had not achieved nationhood at that time.

Then we come to post-Vedic age. The Dharmasutras text of *Gautama* is regarded to be the oldest of the series. But we have previously said that the *Yavanas* (ch. 4) are mentioned in this text. Hence it has given rise to the conjecture as to whether it is written after the Macedonian invasion.[18] Gautama at first says, "All co-parceners are equally entitled to a property received by the right of sale, purchase or gift" (Ch. X). Later on he enlarges it thus: "After father's death, let his sons divide the father's wealth. If during his father's life time, the mother ceases to be past child-bearing age and the father wishes it, then the sons may divide their father's wealth. If the father wishes after giving all wealth to the eldest son, he can give the remainder of the sons that much wealth as is necessary for their maintenance. In partition there is increase of Dharma. The eldest son gets twentieth part of the wealth, male and female slaves, animals with two sets of teeth, chariot, cow and bull. The castrated animals, and animals of other characteristics go to the second son. If there be many sheep, then one sheep, paddy, iron, carriage, house and one quadruped animal will go to the youngest son, and the rest of the wealth will be equally distributed, or the eldest will get two shares and the rest will get one share each, or according to seniority each will get one share more,.....

18. There is a dispute about this word in Gautama. Some say that the Indians knew about the Greeks from the time previous to Macedonian invasion. They point out that the Greek writers accompanying Alexander mentioned the Greek colony at Nyssa on the Hindu Kush region. But this is to be doubted. The ancient Greeks had the Chauvinism like the modern Hindu nationalists in seeing their fellow-countrymen wherever they went. The ancient Persian inscription of Darius called the Greeks as Jauna. While in the Old Testament a grandson of Noah was called Javan. Hence it is problematical from which source the ancient Indians got the name of the Greek people. Any way, it is a corruption of the Greek word Ionian.

the son of the eldest one will get sixteenth share in oxen, or the youngest son will get equal share with the son of the eldest one, or the brothers will get special shares according to the different mothers..... Those who are connected with *pinda, gotra* and *rishi*-relationship they have also right to the wealth."

The noticeable points in Gautama are: there was no talk of impartibility of ancestral inheritance, hence there was no family collectivism or communism extant in the post-Vedic period of Indo-Aryan society; primogeniture was suggested, and the right of a son born of *Niyoga* was hinted at. It allows share to a non-agnate even. It allows a member of a joint-family to keep his self-acquired property. It safeguards the priestly interest that only a person learned in the Veda can inherit the wealth of a sonless Brahman.

But in modern times a discussion has arisen regarding the authenticity of this version of Gautama. One of the bed-rocks of Vijnaneswara's dictum (Utpaiyaiva arthaswamitvam labhete...) which says, "By birth alone one acquires ownership of property; this is the sages declare" is not to be found in the current edition of Gautama's text.

In this matter Kane says, "A few *sutras* quoted from Gautama in the Mitakshara,.....the Smriti Chandrika and other works are not found in the extant text. This fact along with the interpolation of one chapter[19] makes it clear that the present text of Gautama is of somewhat doubtful authority". But elsewhere he says regarding the above mentioned *sutra*,[20] that it is not to be found in the texts of Apararka and several other works.[21] It is strange that though the authors of Mitakshara and Apararka were flourishing in nearly the same age of Indian history and both of them hailed from the Maharashtra country yet they had different versions of the text. Later on, Srikrishna Tarkalankar of Bengal, the commentator of Jimutavahana's *Dayabhaga* called this *sutra* as *Amula*, i.e., not original (on Dayabhaga, I, 21, p. 14).

19. The Chapter 29 of the current text is Chap. 28 in S. B. E. Vol. II. Hence one chapter has been added.
20. Kane: Vol. I, p. 16.
21. Kane: Vol. III, p. 557.

Likewise, another commentator named Achyuta pointed it out also.

The next post-Vedic sutra-writer is *Baudhâyana.* Kane says that the fourth *Prasna* is probably an interpolation. While dealing with *Prayaschitta* he talked about Dayabhaga (Prasna II. Kanda 2). He says, 1, "A man may divide his ancestral property equally amongst all his sons without difference, 2, or he may reserve for the eldest the best part; or the eldest may receive (in excess) one part out of ten, and the rest may divide equally. The wealth of a sonless person will go to his wife, or the (sonless) wife will get a son by her husband's younger brother (Junior Levirate). But the son begotten by anyone else than her husband's younger brother (Niyoga) will not be entitled to wealth. The unmarried and unsettled daughters will be entitled to their mother's wealth. The uterine brothers will get the bride-price (sulkya) received at their sister's marriage after the death of their mother. Some say, they are entitled to it during their mother's life time. The wealth of a deceased person will be divided at first among the members of the re-united joint family (*samsrista*). If a brother living in the united family dies, then he who lives outside the family (*asamsrista*) gets the wealth of the eldest brother. If a brother happens to be born after the partition of the wealth, he will only get a share of parental wealth. If among the united brothers, one happens to be a physician and the other something else, then the physician will be the possessor of all his self-acquired property. Then begotten on one's wife by another, (such) six kinds of sons, are entitled to parental wealth. The other six kinds of sons, viz., son born in his mother's maidenhood, born of a wife who was formerly a widow, son of a *putrika,* bought up sons, etc., are only entitled to their father's *gotra,* but in default of a begotten son of the father, they are entitled to one-fourth of the parental property. Then the sons according to the *varnas* of their mother are accorded.....The *srotriya* is entitled to the wealth of a sonless Brahman, the king is entitled to the wealth of the sonless persons of other *varnas.* The mentally defective persons and the eunuchs are entitled to maintenance only. The share of a mentally defective person will be equal with the son

of a *sudra*-wife. There is no partition in water, etc., and in servant-girls" (Chap. XXVIX=Chap. XXVIII of S. B. E. Vol. II). 5. If the partition takes place during the life-time of the father, the cows, horses, goats and sheep are the share of the eldest" (West and Buehler's digest).

Gautama's text is the first written record that we get of Indo-Aryan legal system. By scanning it we find that it is partly ideational and partly echoes of existing usage. The rules given in Gautama agree with those mentioned in Vedic literature. At first he speaks of equal division of inheritance. His rules bear a family resemblance with the rules of later *Smritis*.

The next sutra-writer is *Apastamba*. He in II. 6. 14 speaks about law. He says, 1. "After having gladdened the eldest son by some (choice portion of his) wealth, a man should during his life-time, divide his wealth equally amongst his sons, excepting the ennuch, the man mad, and the outcast..... 6. Some say that the eldest son alone inherits..... 10. The preference of the eldest son is forbidden by the *Sastras* (Vedas)..... 14. Therefore all (sons) who are virtuous inherit." Further he says that usages and customs are not to be followed if opposed to the Vedas. (S. B. E. Vol. II).

In Apastamba we find that he along with his predecessors advocated equal partition between brothers. But like in some social matters, he was radical also in legal matter. He was against primogeniture system or preference being shown to the eldest son. This, he says, is contrary to the Vedas. But in the above-mentioned quotation of T. S. we have read the contrary. Any way, he was the first person to decry primogeniture.

Finally from these sutra-writers of post-Vedic age we do not find any substantiation of the claim that common ownership of ancestral property was prevalent during the early age of Indo-Aryan civilization. So far we have not found tribal or clan collectivism in property. One thing to be noticed here is that Apastamba had been against usage and custom to be taken as law. These three texts have been written between post-Vedic and Maurya epochs. Even, they might overlap the Maurya epoch. The next text to be counted as authoritative exposition of

post-Buddha Indian law of inheritance is Arthasastra of *Kautilya* which had been the imperial code of the Mauryas. It is a strange thing that Kautilya has not been referred to by the mediaeval and modern law-book writers. But Arthasastra is a landmark of Indo-Aryan civilization and as such must be taken into consideration.

In Kautilya's Arthasastra we find that there are elaborate rules regarding the division of inheritance (161-163). He gives a complicated rule of procedure regarding the division of father's property. Thus Kautilya says, "Sons, whose fathers and mothers or ancestors are alive cannot be independant (*aniswarah*). After their time, division of ancestral property among descendants from the same ancestor shall take place, calculating *per stirpes* (according to fathers)"[22] (160). The same has been said by the latter-day Manu (9. 110). Then he says, "Self-acquired property of any of the sons, with the exception of that kind of property which is earned by means of parental property is not divisible"[23] (160). The same view has been expressed by the still later Yagnavalkya (Bengal ed. II. 120). Again he says, "Those who have been living together shall re-divide their property, whether they had already divided their ancestral property before or they had received no such property at all"[24] (160). Further he says, "A father distributing his property while he is alive, shall make no distinction in dividing it among sons of his share"[25] (161).

From these dicta of Kautilya we find that he does not speak of "common ownership" of the father and the son in the ancestral property. In the last dictum quoted here he gives absolute right to the father in his property. Thus he shuts out all sense of collectivism in ancestral property. Again he says, "as a rule, division is to be made of all that is in existence, but of nothing that is not in existence. Having declared before witnesses the amount of property common to all as well as the property constituting additional shares of the brothers (in priority of

22-26. R. Shamasastry: Kautilya's Arthasastra, pp. 181-183.

their birth) division of inheritance shall be carried on. Whatever is bodily and unequally divided, or is involved in deception, concealment or secret acquisition, shall be re-divided"[26] (161). The same view is also expressed by Yagnavalkya (Bengal ed. II. 129).

As regards the outcastes, the mentally and physically defectives, Kautilya says "They shall have no share" (161). As regards the sons of many wives his dictum is that, "it is by birth that primogeniture is decided." (163). Then in regard to the artisan classes and the *vratyas* he says, "Inheritance will go to the capable, and the rest will depend upon him for subsistence"[27]. But this by no means imply family collectivism, as in the next sentence the text says, "In the absence of the capable, all will have equal shares"[28] (163). In this provision, there is no trace of joint family inheritance right as in mediaeval and modern days.

As regards *anuloma* marriages, the code gives preferential shares to the sons of the wives according to the highness of the *varnas*[29] (163). Then the code speaks of inheritance of children of mixed marriage (*anantarah*) according to manly or superior (*manushopetah*) qualities (163).

From this elaborate rules of partition of the father's property in the Kautilyan text, we do not get any inkling of family communism or collectivism in family property or right accruing out of joint-family system. Again, a German scholar, by making a close study of the writings of Megasthenes on India and that of Kautilya, finds agreement in fundamental matters between the two authors. One of these points of agreement that concerns us here is, that state-ownership of land with right of occupancy and transfer by sale, mortgage, etc. were vested in the people for fiscal purpose. Thus, the possibility of communism in land is also shut out by the informations gleaned from the Arthasastra.

27. R. Shamasastry: Kautilya's Arthasastra, pp. 182-183.
27-29. Shamasastry: p. 185.

Thus gleaning the dicta of Arthasastra we find that there is continuity of the law of inheritance. Kautilya also hints at preferential share to the eldest son. He allows division of father's properties, both moveable and immoveable. He also speaks of division of property of those who live jointly. As regards the inheritance of the sons of mixed marriages he follows more or less the usual sutra-legislations of varna division.

Then we come to post-Mauryan *Manusmriti*. It says, "After the death of the father and the mother, the sons equally divide the property, as during the life-time of the father the son has got no ownership in father's property" (IX. 104). The next aphorism says, "The eldest (son) will keep the property, and the younger brothers will live on him" (IX. 108). The annotator Kulluka Bhatta explains that if the eldest brother is religious, and all wish to live conjointly, then without making any partition, the eldest brother will take alone the charge of the property, the younger brothers shall obey the eldest brother like father, and for their maintenance will depend on him. The annotator further explains that this sentence upholds that if the eldest brother is capable of protecting all the property and the younger brothers do not want to divide the ancestral property, then this arrangement is to follow; otherwise it is not said that after the demise of the father only the eldest son has got the right of inheritance of ancestral property (105). It seems that Kulluka interpreted it according to the dialectical situation when either primogeniture or preferential share of the eldest son or the eldest son as the trustee of the father's property was not spoken of by the *Nibandha*-writers.

The next sentence contradicts Kulluka's interpretation. As Manu says, "In the birth of the eldest son.....man becomes a father and also becomes free from the ancestral debt, hence the eldest is properly to be called *son*, the youngers cannot be called sons, on this account the eldest son is fit to inherit all the

30. Dr. Bernhard Breloer: "Kautilya Studien" I. "Das Grundeigentum in Indien" 1928 quoted by Shamasastri. Preface XXXI. 3rd. ed.

wealth" (106). The next aphorism reiterates the same claim as the eldest son is called "son by religion" (107). The next aphorism says, "The eldest brother (by living with the younger brothers) will maintain them as the father maintains the sons and the younger brothers shall be obedient to the eldest" (108). The next aphorism is the glorification of the eldest son. From this injunction we find that there is a tendency to uphold primogeniture of succession. Here we find an echo of Arthasastra legislation applied to all.

Finally, Manu advises all to live together without division, or being desirous of performing *Panchajajnas* separately, they should live apart, (111). From these injunctions we do not get any trace of family communism. On the contrary, we find that joint-living was not obligatory with the brothers. Rather it can be said that both Kautilya and Manu in consonance with the former legislators advocated primogeniture in some form or other. Then Manu allots shares to the sons of a brahman by wives of four *varnas* proportionate to the stand of the varnas (15). As regards the proprietorship of the land, Manu says, "The man who clears the ground becomes the proprietor" (9.44). Thus it negates the theory of communism or collectivism in land in ancient India. Here we close the topic on Manu by pointing out that there are some similarities between the dicta of Kautilya and Manu in the matter of inheritance.

Another post-Mauryan smriti-text is *Vasistha-Samhita*. Its latest date is assigned to 100 B.C. [31]. There is nothing striking in this text except that it prohibits learning the language of the *mlechhas* (ch. 6). The text is a repetition of former smritis. It first says that there are twelve kinds of sons only which are recognized by the ancients (ch. XVII). Later it says, "The (learned) declare of these, six sons are heirs and kinsmen and preservers from great dangers." Here he gives a definition of these six sons. Then the text adds that of those who are not heirs, the sixth is the son by *Sudra* wife. These six sons are kins-

31. Kane: Vol. I, p. 59.

men but not heirs. Here he gives a list of them. Again it says that, "The last mentioned six sons shall inherit the property of him, who has no heir belonging to the first mentioned six classes." Finally the text says, "Now about the partition of paternal property among brothers: The eldest will get two shares; best cow, horse, goat, lamb and house will go to the eldest; wood, cow and javas (corn) will go to the youngest; and materials for furnishing the house will go to the second brother. As regards the wealth received by the mother during her wedding, it will be divided among the daughters" (ch. XVII). Here we notice that this text does not throw further light on inheritance. Kautilya (161) and Manu (IX. 119) have ordained division of father's property in like manner. Then the text gives the usual rigmarole about the preferential rights of the offsprings of mixed marriage according to the varna of the mother. The thing noteworthy in this text is that it does not speak of collective property of the family, nor of common ownership. Further, the *samhita* says, "In quarrel concerning family or field the word of the *samanta* is to be believed" (ch. XVI). Here we get the information about individual peasant-holding and the feudal landlord. In this text we find that preferential share of the eldest son is spoken of.

Thus closes the chequered legal history of the Indo-Aryan society in a centralized unitary state. The appearance of the *samantas* marks a new chapter in the socio-political history of the Indo-Aryans. India was on the threshhold of a new chapter in her history—the Feudal Age.

About 300 A. D. with the close of the Satavâhana ruling dynasty, we find that India is on the eve of a fresh renaissance. New ideas with new institutions are impregnating the Indian life. From this time on, a new culture is in the making. We find a revival of *Brahmanism* under the favourable aegis of the orthodox new rulers. With the decay of the Satavâhana power came the Vakatakas and the Bharasivas. In this age, Jaimini was trying to rehabilitate Vedic Ritualism. At the same time, Vâdarayana synthetizing the ideologies of the conflicting Upanishads presented the Indo-Aryan people with an authoritative scripture —The *Brahmasutras,* also called *Vedânta-Darshana,* which is ac-

knowledged by all the brahmanical sects. The Jainas and the Buddhists had receded to the background by losing their political power and influence. After the Satavâhanas, we find new gods and goddesses being worshipped and the people are donating to the funds of the temples with new set of gods. The rulers are donating riches to the brahmanical temples, and villages to the Brahmans. In this period which synchronizes with the Vakataka and the Bharasiva rules, we first meet with the names of the *sâmantas* in the epigraphic records. Land was being held in sub-infeudation. Fiefs, benefices, and immunities were being granted to the favourites of the kings. Foreign domination had receded to the farther north. The foreigners who settled in India had accepted either Brahmanism or Buddhism as attested by the inscriptions. Then basing on these materials, arose the Gupta empire with its galaxy of celebrated literati some of whom still retain world-wide reputation. In this age, we hear of the astronomers Aryabhatta and Brahma Gupta, the poet Kalidas, and the nine jewels of the court of Vikramaditya. Again, we surmise a brisk trade with the outside world as exampled in the introduction of the Roman coin *Dinarius* (Dinar). By scanning the epigraphic records we find that feudal system reached its apex in the Gupta age. It ushered in a new feudal culture which modified the old ideologies in religion and politics. It is natural that this age will also influence the *vyavahara* which is regarded as a part of religion. The importance of feudalism in its socio-economic and cultural aspects is not yet evaluated by those who are interested in Indian culture.

Feudalism evolved in India with neo-Brahmanism at the apex. The new recensions of the epics and the Puranas and the texts testify to the significance of the new evolution of Indian socio-cultural development. Here we will trace its influence in law.

The first *smriti* that opens the new age is that of *Yajnavalkya*. He is not to be identified with the sage of the vedic Aranyaka or with the sage who discoursed with king Janaka of Mithila. Jayaswal says that he was born somewhere in north India[32] while the Scythians were ruling. Next to Manu, Yajnavalkya's text is

32. Vide Kane: Vol. I, p. 169.

the most important *smriti*. The smriti of Yajnavalkya has overshadowed every other smriti, especially in legal matters. The text clearly speaks that in the case of a dispute about the boundaries of an agrarian land, the neighbours should fix the boundaries by recognizing raised lands, ashes, banyan trees, bridge, etc. (II. 153-155). In this connection he also says, "If in the case of fixing the boundary anything turns out false, then the king should punish with amercement of the second class (*madhyamsahasa*) all the witnesses and the *samantas*" (II. 155-156). Here, again, we hear of the feudal landlords. Thus communism in land is clearly shut out by this injunction.

Then the author speaks of law (ch. II). He says, if the father partitions the property, then he can allot shares to his sons according to his will, or he can bestow greater shares to the eldest son or can give equal shares to all sons. If the father makes an equal division, then he should give equal shares like the sons to those women (*patnyas*) who have got no *stridhan* (women's property in absolute right) from their husbands or fathers-in-law. If a person is capable of earning for himself and is not desirous of getting any property of the father, then (the father) can divide (the property by giving) him a little share. Again, this unequal division made by the father if sanctioned by the *shastras* (*Dharmya*) will remain unchanged. After the death of the father and the mother, the sons coming together will divide father's wealth and debt, and the daughters after paying off the debt of the mother, will divide the *stridhan* among themselves; if there is no daughter, then the sons will take it up" (II. 116-119).

Thus Yajnavalkya clearly says that the father can partition his property among his sons at will in his life-time. Also he says that after the demise of the father, the brothers should divide it among themselves in equal shares. Then he allows the father to bestow a bigger share to the eldest son. In this matter he follows the dicta of Kautilya and Manu mentioned above. Here it should be mentioned that attention has been drawn by the present-day investigators that in some points of law Arthashastra

33. Vide: "Age of Manu and Yajnavalkya".

and Yajnavalkya samhita agree. Dr. Shamashastri speaks of the indebtedness of Yajnavalkya to Kautilya[34].

From a perusal of Yajnavalkya samhita regarding inheritance, it is seen that he has followed the traditional custom of law. But later on, one of his dicta (II. 122. Bengal edition 124) which speaks of "equal ownership" in grandfather's property has raised lot of controversy which has resulted in dividing the Hindu Law. Regarding the extant text known as Yajnavalkya smriti or samhita a few words must be said here. Kane says that different copies of the text contains different number of verses. Kane notices, "a good deal of variance in the readings adopted by Visvarupa (the first commentator) and the Mitakshara, though the meaning is not often affected"[35]. Then he says, "Even in the days of Visvarupa (800-825 A.D.) there were various readings in Yajnavalkya"[36]. After finding out the differences, finally he says, "But the text remained in the main the same from 700 A.D."[37].

Then we come to the *samhitas* that were written at an age that synchronized with the Gupta era. One of them is the *Vishnu Samhita*. As regards *Daya* it says, "If the father divides his own property among his sons, then he has got arbitrary right to partition it, but in the grandfather's property the father and the son have got equal ownership (*Svâmitya*) (17.1-2). But if after the partition, a brother is born to them, then they are obliged to hand him over his proper share (17.3). The property of a sonless person goes to his wife. In the absence of his wife to son of the brother, in his absence to the friend, in his absence to the mother, in her absence to the brother, in his absence to the son of the brother, in his absence to the friend, in his absence to the *sakulya;* in his absence to the king except in the case of a *brahman's* property. The property of a *brahman* goes to a *brahman* (17.4-14). Vishnu also ordained, that "He who is heir to the property is to offer funeral cake (pinda)" (ch. 15.39). In these dicta, the second aphorism *'tulyam swamityam'* clings

34. Vide R. Shamasastri: Preface p. XIV.
35-36. Kane: Vol. I, pp. 171-172.
37. Ibid: p. 176.

to the same with the aforesaid dictum of Yajnavalkya *'sadrisam swamyam'*. Both means "equal ownership". In the end the text says, "the partition of the property of a person amongst the grandsons from different sons will follow their fathers' shares. He will get that much share which is his father's and not the others (17.23)." The aphorism is the same as that of Yajnavalkya (II. 123 Bengal ed.). Further Swarasvati-vilas cites an aphorism from the text of Vishnu that "ownership accrues by birth." But this is not found in the smriti. Then he gives a list of usual rigmarole that what share a son will get will be according to the *varna* of his mother (XVIII). Finally, the text says, a Sudra who is the only son of a father of a *dwija* (=twice-born, *i.e.* Brahman or Kshatrya or Vaisya) *varna*, shall inherit half of his property (XVIII. 32).

Now we may quote some *smritis* the texts of which are not extant to-day but are quoted by some mediaeval writers:

"After the death of the father, the division of the wealth is equal (among sons)"—*Harita* quoted in *Mayukha*.

"Partition among sons of the same class is regulated by the rule of equal shares."—*Usana* quoted in *Ratnakara*.

"Up to the (third degree) the members of the family are of the same body."—*Devala* cited in *Ratnakara*.

Perhaps this is the bed-rock of Yajnavalkya's famous aphorism of II. 122 which is of later date. Mitakshara ascribes to Devala the differentiation of the house-holders into two kinds: Yâyavara (nomads) and *salina* (prosperous settled down family man). The former are those who abstain from accumulating wealth and live upon doing priestly function, teaching and receiving gifts. The latter are those established on six kinds of means of living, *viz.*, ownership of houses, villages, wealth and cultivated commodities. Kane says that he flourished at the time of Vrihaspati and Katyana.

Now we come to another mediaeval legislator *Narada*. He says, "Whether the father distributes equal shares to his son, or again more wealth to some and less to others, such shall be their shares; for the father is the lord of all." (Colebrooke's Digest. p. 32). Again he says, "A man is the master of his own house." (Rina dana 32). Thus he emphasises that a man has got abso-

lute right over his own house and property. He also speaks of giving preferential share to the eldest son (Narada. XIII. 4. 13. 8).

Now let us refer to an ancient legislator *Vrihaspati* who is earlier than Kautilya as he is quoted by the latter. His original treatise being lost, we gather his opinion on different matters from the quotations of other writers. Viswarupa while discussing on Yajnavalkya (II. 38) cites a passage from Vrihaspati, that the illegitimate son of a Sudra gets a share on his father's death. Again, in the case of a Sudra leaving no legitimate issue, the illegitimate son gets the whole estate with the permission of the king[38]. Thus this ancient legislator was liberal to the Sudra.

Another ancient writer who is quoted as early as in Kautilya's work, is mentioned here. He is *Bharadwaja* whose treatise is now lost. He survives in quotations now-a-days. His opinion regarding *vyavahara* is quoted in the *Saraswativilas* (p. 314) which says, that "A compromise, an exchange and a partition, if fair and equal, could be annulled only for ten days, but could be annulled till the ninth year, if unfair"[39].

From these two ancient writers we do not get any idea of family collectivism; rather they talked of partition, and partition even with an illegitimate son who is naturally outside the clan[40]. Then let us take up *Vrihaspati* of the early mediaeval era. He is a different man from the aforesaid *Vrihaspati*. He used the words *"Nanaka"* and *"Dinara"* the names of two sorts of foreign coins. He must have flourished about 400 A. D. or may be still later according to some. Two interesting facts are to be gleaned from these two *Vrihaspatis*. The first is, as we have seen above, that when the customary legal rule fails, the king is the final authority in the matter. In the second case, the mediaeval Vrihaspati compares *vyavahara* with Yagna, the king with *Vishnu*, and the *sabhyas* with the priests in a sacrifice.[41] From these verses we come to the same conclusion that we arrived at elsewhere during

38-39. Kane: Vol. I, pp. 125; 128.
40. Cf. the status of *Ghatatkacha* who claimed to be a scion of the Kuru Clan, as he was a son of Bhima. But Krishna called him a *rakshasa* (Mahabharata-Karnaparva).
41. Kane: Vol. I, p. 211.

our discussion about the authoritative source of Hindu Law, that the king was the final authority in legal discussion. Colebrook cites an aphorism of Vrihaspati in which two kinds of partition among heirs (during the lifetime of the father) are expressly mentioned: the one with attention to priority of birth, and the other with equality of allotment. Then he quotes, "The eldest (or he who is pre-eminent) by birth, science and virtuous qualities, shall receive (after the death of the father) two shares of the heritage, and the rest shall share alike, but he is (venerable) like their father." (Colebrook. 45. Vrihaspati XXV). Here we find that preferential share of father's property is given to the eldest son. The last aphorism is an echo of Manu in this matter.

Another writer of the mediaeval age is *Vyasa* who according to Kane flourished not later than fifth century A. D. He allows the father and sons equal shares[42] (*samâmsina*), and allows partition even against the wish of the father (quoted by Apararka—p. 728).

Another important legistator of mediaeval age is *Kâtyayana* who according to Kane must have flourished not later than sixth century A. D. His work on *vyavahara* is yet to be recovered. He is quoted by the subsequent Digest-writers. He says, "when a son (of a man) dies undivided, his son (grandson) shall be made sharer of the heritage, if he has not received maintenance from the grand-father. He shall get his paternal share either from the paternal uncle or his son. But the very same share should equitably belong to all the brothers, or his son shall be entitled. After this, is cessation of right." (cited in Apararka, Ratnakara, etc.). Again, he is quoted thus: "In grand-paternal property, father and son have equal rights. But in self-acquired property of the father, the son has got no right (cited in Ratnakara)"[43].

Again, there is citation in Colebrook's Digest which says, "If a father during his life, divide the property, he shall not prefer one of his sons, nor exclude one of them from a share, without

42. There is no discussion about inheritance in the text extant in Bengal.
43. There is no reference to vyavahara in Bengal version which is Jibananda's Edition.

a sufficient cause (Cole. Dig. 37)." Here we notice that in the mid-period of Feudal Age, the law of primogeniture is gradually giving way to equal partition among the brothers.

Further, in much later age, *Jimutavahana* of Bengal while arguing that during the division of the self-acquired wealth of the son, his father will get two shares, he cites Kâtyayana who according to the citator says tacitly: "The father will take two shares or half portion from the self-earned wealth of the son, and the mother after the demise of the father (her husband) becomes equal co-sharer with her son" (Dâyabhâga—38). This is a reverse process to the theory of "equal ownership" as seen beforehand. All these are confusing and we do not get the real opinion of Kâtyayana in question here. Kane says[44] that there are different texts of Kâtyayana, viz., *Vriddha, Upa,* and *Sloka;* also there is one called *Karmapradipa* (Jibananda edition). Hence, we are at a loss to find out which is the original text that gives these aphorisms.

Another late legislator is *Pitâmaha* whose date is not later than seventh century A.D. He cites the *Junior Vrihaspati* who has said, that "A law suit between members of the same village society, town, guild, caravan or army must be decided according to their peculiar usages."[45] This has also been expressed in *Sukra-nitisar.*

Then we come to the last period of Smriti-writing. There is a text called *Samgraha* or *Smriti-Sangraha* cited in Apararka, Mitakshara and other works on religious topics. The citations from it are very important to the history of Hindu Law. According to Kane, its date may be put between the eighth and the tenth century A.D. It says *Dâya* is the wealth that comes from the father as well as the mother (quoted in *Parasara-Madhaviya*—III. p. 478). It opined that ownership arose from the dictates of the *sastra* and not *laukika,* i.e., secular (*Smriti Chandrika, Vyavahara--Mayukha*—p. 257). Then it says that partition creates ownership of the son as regards paternal wealth (in which he has no rights by birth) (*Mayukha* p. 259). According to this text, ownership does not mean to dispose of a thing at one's

44-45. Kane: Vol. I, pp. 218; 227.

will, as the *sastra* lays down rules for the disposal or application of all things.[46] The most noticeable dicta of this text are: the special share given to the eldest son, the practice of *Niyoga* and killing of a cow are all prohibited in the present age. (*Mayukha* p. 266; *Parasara-Madhaviya* III. p. 492). Here we find a break with the past in the matter of primogeniture and *Niyoga*. But the author of the text goes back to the past in many places as he frequently quotes Manu. His reliance on the past made him controvert the dictum of ownership by birth. Kane says that in *Vyavahara* the text is much more advanced than that of *Yajnavalkya* and *Narada* as they do not contain controversial questions about ownership and partition, etc.[47] Kane surmises that it is not unlikely that this text was in vogue in the kingdom of Raja Bhoja of Dhârâ, that made him to follow this text.

Here closes the period of Dharmasastra or Smriti-writing. According to Kane it closes with 800 A.D. The above-mentioned texts may fall within this period. Then till 1800 A.D. followed the age of commentators and *Nibandhas i.e.*, Digest-writers. This age synchronizes with the Rajput and Mohammedan periods of Indian history. In this long period of one thousand years, the Rajputs spread over the greater part of India, and the different clans establishing their own kingdoms were constantly fighting among themselves which resulted in foreign invasion and subjugation of the country of the *Indo-Aryans*. As Jayaswal has said that after the close of Gupta empire, India did not produce a genius any longer except a few men whose appearance was more of an episode than the normal run of the race. During this long period the Indo-Aryan mind was in decadence, and was living simply on vegetating on the past. These commentaries and digest writings do not prove any originality of the Indo-Aryan mind. As in politics and in social affairs, so in law no original chord has been struck up. Only there were dialectical disputes, the one polemizing against the other. Each one quoting the previous authors to prove his contention. There has been a complete torpor in the Indo-Aryan mind.

46-47. Kane: Op. cit., pp. 240; 241.

The next writer in question is *Dhareswar* or the king Bhoja of Dhârâ. His date must be between 1000—1055 A.D.[48] Dhareswar held ownership to be known only from the *sastra*. He also speaks against giving a preferential share to the eldest son and lesser share to the other sons. Again, he, like *Smriti-samgraha*, denies the right of ownership by birth.

Another important digest-writer is *Srikara* of Mithila. He is earlier than 1050 A.D. He lived probably in the ninth century.[49] Sarbadhikary says: "Srikara must have promulgated his treatise before either Dhareswar or Viswarupa."[50] He also says that before the time of Srikara, Hindu Law was undivided. "The novel theories of Srikara set the minds of men thinking.....In the eleventh century great changes were being effected in all parts of India. Although the Muhammadan conquerors from across the Hindukush had not yet established their supremacy in the country, foreign ideas were being introduced, and the bonds which formerly united the whole Hindu Community were greatly loosened. .....But after the accession of these ideas, and the disturbance naturally caused by political changes, the unwritten law of the country developed into a new form, and claimed a co-ordinate rank with the authoritative law of the ancients. .....The conservative spirit of Hinduism would not brook the idea of levelling down all the ancient authorities and building on an entirely new fabric. The fiction of deducing the customary law from the written law was resorted to, and the result was that the legislators of each State put such an interpretation upon the ancient ordinance as would be conformable to the public opinion of the provinces in which they promulgated their law."[51] Thus a new era in Hindu Law engendered by new politico-economic situation had dawned in India. In this era the said jurist speaking about the practical source of the current law in vogue among the Hindus, says, "*Manu* and *Yajnavalkya* are cast in the shade, and *Vijnaneswara* and *Jimutavahana* have come to the front".[52] Thus, dialectically Indian Law had entered

48-49. Kane: pp. 268; 279.
50. R. Sarbadhikary: p. 256.
51-52. R. Sarbadhikary: pp. 259 262.

a new phase of history. *Srikara* has been quoted both by *Vijnaneswara* and *Jimutavahana*. The latter in his Dâyabhâga has controverted some of *Srikara's* views. Srikara long before Jimutavâhana, propounded the view of "spiritual benefit" as the criterion for judging superior rights of succession. This means that he who is entitled to offer funeral oblation (*pindam*) is to become the reversioner of the estate of the deceased. Kane says that the *Smritisâra* of Harinatha ascribes this view to a *Srikara-nibandha*[53] (I.O. Cal. No. 301, folio 147a).

Then we come to *Viswarupa* who wrote a commentary on Yajnavalkya-Smriti called *Bâla Krida*.. He flourished after the Arab invasion of Sindh as he mentioned the Tajiks (on Yajna, III. 256). Kane puts his date to be between 750—1000 A.D; elsewhere he says, in the first half of the ninth century.[55] Viswarupa in his treatise holds the same view with subsequent Mitakshara that ownership does not arise from partition, rather partition takes place of what is already jointly owned.[56] Then commenting on Yajnavalkya II. 118 he allows the father the freedom of distribution of property without any restriction among his sons during his life time. But this is controverted by the latter-day Mitakshara which interprets this power of unequal distribution to be restricted to self-acquired property.[57] Here it looks like a contradiction in Viswarupa's commentary. When he acknowledges that ownership arises by birth, then all brothers have equal rights in ancestral wealth, in that case how a father can be capricious in the distribution of his property. All the sons born of the father have equal ownership in grand-father's property, the father cannot bequeath anything at his sweet will. It seems he tried to reconcile the ancient Indo-Aryan custom with Yajnavalkya's new-fangled dictum of common ownership. But the Madras edition contains the following version: "The text about partition at option, refers to self-acquired property. Therefore it is proved that partition takes place when there is (antecedent) ownership."[58] Again, com-

53-54-56. Kane: Vol. I, pp. 267; 261; 259.
55-57. Kane: Vol. III, p. 557.
58. Vide J. C. Ghosh: Vol. II. But this text is not a reliable one as stated by Ghosh.

menting on Yajnavalkya II. 122 Viswarupa there connects the words 'without detriment to the paternal estate' with the words 'whatever else is acquired by himself' and not with *'maitra'* (gifts from a friend) and *'audvâhika'* (gifts on marriage).[59] As regards partition Viswarupa says: "In land derived from the grand father, indestructible property or other property, the right of both father and son is equal. This is undoubted. The text about partition at option, refers to self-acquired property. Therefore it is proved that partition takes place where there is (antecedent) ownership."[60] Further, Viswarupa permits one share out of ten to the son of a Brahman begotten on a Sudra wife without restriction of any kind. But in this matter Mitakshara limits the share to estates other than land acquired by gift.[61] Here, in the dictum of Viswarupa the theory of clan collectivism fails, as this son of a Sudra wife according to the *Smritis* cannot be a member of the agnatic Brahman clan of his father. Also, when Yâjnavalkya says that the illegitimate son of a Sudra begotten on a slave girl (*dâsi*) may get a share if the father wills it (II. 136 in Jivananda edition), and after the demise of their father, his brothers begotten on the married wife will give half share of what would be given to a *savarna* brother, he breaks the rule of clan relationship. The illegitimate son may be *sagotra* on account of his father, but socially he cannot be of the same family or clan. Viswarupa restricts this 'half share' of Yâjnavalkya (Kane II 138) to "some portion", not necessarily half. The noticeable point of Viswarupa is that he did not mention two kinds of property: *Sapratibandha* (obstructible) and *apratibandha* (unobstructible). In the same way opined *Bhâruchi* who is earlier than 1050 A.D.[62] Again, commenting on Yajnavalkya (II. 117, Jivananda edition) Viswarupa says: "If the father makes equal division, then he will bestow equal shares like the sons to the widows whose husbands or father-in-laws have not given her any share of property (*stridhan*)." Kane translates this aphorism (Kane II. 119) thus:

59. Kane: Vol. I, p. 259.
60. Vide J. C. Ghosh, vol. II.
61. Kane: Vol. I, p. 260.
62. Kane: Vol. I, pp. 266, 259, 275.

"Viswarupa allows a share of property to the widows of predeceased sons and grandsons of a man when a partition takes place during his life time."[63] In this matter of "wives" (*patnyah*) Mitakshara interprets it as father's own wives when he partitions the property during his life time.[64] From perusing Viswarupa's dicta we find that though writing the first commentary of Yajnavalkya, he spoke of right by birth, yet he nowhere restricted the right of the father to partition his property as he liked. Again, he did not divide property into two kinds as made in Mitakshara. It is clear, that he nowhere advocated family-communism or impartibility of father's property. The father, according to him, has got absolute right to bequeath his property.

Now we come to *Medhatithi*, the celebrated commentator of Manusmriti. *Kullukabhatta* another commentator of Manu says that he is much earlier than *Govindaraja* (the commentator of Manu and Râmâyana whose date, according to Kane, is between 1050—1100 A.D.). He is anterior to Viswarupa. Hence his date must be between ninth and tenth centuries. Kane puts his date as 900 A.D.[65] The author of Mitakshara while annotating on Yajnavalkya II. 124, refers to the views of Asahaya and Medhâtithi (on Manu IX. 9. 118) that at the partition of father's property between brothers, the fourth share is to be given to an unmarried sister. Kullukabhatta, the annotator of this verse of Manu says, that from this aphorism it is clear that after the death of the father, the daughters get shares of property like the brothers, and what remains surplus after their marriages, must go to the daughters otherwise the brothers become degraded (*patita*). The date of Kullukabhatta is assigned between thirteen and fourteen centuries A.D.

Again, Kane emphasizes the fact that "Medhâtithi favoured the view of ownership by birth and quotes (without mentioning its author) the sutra in a slightly different form (on Manu IX. 156)". Here, Medhâtithi while commenting on the aphorism of Manu IX. 156 where it is said that "The sons of the *dwijas* (twice-born) born on *savarna* (wives of the same class), after

63-65. Kane: Vol. I, pp. 266, 259, 275.

giving the eldest brother his preferential share, will divide the rest with the eldest in equal proportion," says, that this dictum contradicts the former dictum and he shoves in the aphorism of some unnamed person who has said that birth gives equality in wealth (*arthasvâmyam*). But Kulluka is silent here, he followed Manu. Here we must remember that Medhâtithi appeared in the latter period of the mediaeval era. He was born after the writings of Yâjnavalkya, Vishnu smritis, etc.

Next comes *Jitendriya* who according to Kane is probably a writer from Bengal and flourished about 1000—1050 A.D. He is frequently referred to by Jimutavâhana in his text called "Vyavahâra mâtrikâ." He forestalled Jimutavahana in the view-point that the widow of a deceased person who whether lived separately or in a joint-family, succeeds her husband's estate (Dâyabhâga—P. 256). Again, he held that whatever is acquired by a person without using means or materials jointly owned by all members of a family is his exclusive property. Also he held that the daughter's son is entitled to succeed after the daughter.[66] All these points adumbrate Dâyâbhaga of Jimutavahana.

The next in succession comes *Bâlaka* who is quoted by Jimutavâhana, Shulapâni and Raghunandana. His probable age is before 1100 A.D. He advocates the right of succession of the son of a daughter (Dayabhaga—p. 282). He seems to be a Bengal writer.

Another writer is *Bâlarupa* whose identity with Bâlaka is a debatable one. According to Kane who relied on Dâyabhâga's citation, the two may be identical. As he held the same views as Srikara, hence according to Kane, he cannot be later than 1050 A.D. Bâlarupa basing on Parâsara, held the view that an unmarried daughter of a sonless man is preferred to a married one as an heir. Here it seems to be an attempt to keep the property in the agnatic line, and as such looks like self-contradiction if both the authors be identical. Again, he gives the order of succession in the following manner: (1) *Atmabandhus* (one's own cognates), then *Pitribandhus* (father's cognates),

66. Kane: Vol. I, p. 283.

and lastly *Mâtribandhus* (mother's cognates). Thus, finally he draws in the cognates in the order of succession.

The next writer to be considered is *Vijnaneswara* whose text "Mitâksharâ" is authoritative all over India except in the Panjab, Malabar, Bengal and Assam. The date of the composition of this book is surmised by Kane to be between 1070—1100 A.D. In this work he speaks of himself: "He is a religious mendicant and devoted to the worship of God and is a disciple of one who well-deserves the title of *Uttama* i.e. excellent. The commentary on Yajnavalkya's code is his work".[67] Further he says that when he wrote the Mitakshara, king Vikramarka or Vikramadityadeva was ruling in Kalyan city. This king was a ruler of the Chalukya dynasty (1076—1226 A.D.).[68] Sarbadhikary[69] says that Bilhânâ in his account mentioned the name of that king in whose court he was the chief poet, and in whose council Vijnaneswara was entrusted with legislative work. Sarbadhikary fixed his date as the latter part of the eleventh century. Thus Vijnaneswara though an ascetic, was like most of the Smriti-legislators and latter-day digest-writers, enjoying the patronage of a king. He was the law minister of the King of Kalyan of the Chalukya dynasty which in North India is called Solanki-Rajput clan. Hence he might have lived in the early part of the twelfth century A.D. This is the latest date fixed by Mayne and Iyengar. As regards the text Mitâkshara, Kane says, "It explains away contradictions among them.....and effects a synthesis of apparently disconnected Smriti injunctions".[70] The text "Madanaratna" called him a southern author.[71] It seems, he hailed from the South.[72] The author mentioned of Viswarupa, Medhâtithi and Dhareswara among the hosts of authors whose texts he consulted.

Now, let us here point out the difference that Vijnaneswara had with the above-mentioned legislators. He, along with Viswarupa,

67. R. Sarbadhikary: p. 212; Kane p. 288.
68. Mayne and Iyengar: 10th edition 1938 p. 46.
69. Sarbadhikary: Op. cit., pp. 212-288.
70-73. 74. Kane: Vol. I, pp. 258, 259, 290.
71. Jolly: L. & C., 68.
72. R. Sarbadhikary: p. 283.

holds the same view that ownership for the first time does not arise on partition but that partition takes place of what is already (jointly) owned. Thus, like Viswarupa, he opined that ownership arises by birth. But he disagrees with Viswarupa in interpreting Yajnavalkya II. 118 that power of unequal distribution is restricted to self-acquired property.[73] It implies that he does not allow partition of ancestral property. While Viswarupa permits a portion of property which a man can partition among the widows of his predeceased sons and grandsons during his lifetime, Vijnaneswara restricts it to the man's own wives when he partitions it during his lifetime. According to Kane, he definitely affirmed that sons, grandsons, and great grandsons acquire by birth ownership in grandfather's property.[74] But Mitakshara nowhere has spoken of great grandson's right, it comes in Viramitrodaya where it says that it is implied.

Again, in the case of a son of a Brahman by a Sudra wife, Mitakshara differs with Viswarupa in restricting the share to be allotted to this son to estates of other than land acquired by gift.[75] Again, Vijnaneswara is liberal towards woman and allows a widow to be the heir of her deceased husband.[76] Also he mentions great grandmother's right to inherit.[77] In this matter he is at variance with the Bengal and Southern Schools. Again, he speaks of the relation from the grandfather to the grandson as that of particles of one body.[78] West and Majid say that he nowhere mentions the right of the son's son's son and its commentator Visweswara states in the Madana Pârijâta, that the vested right to inherit does not extend further than the grandson (*Madana Parijat* f. 228. pp. 2, 1, 7 of of Dr. Buehler's Mss.). In the *Subodhini,* however, commenting on Mitakshara Ch. I. Sec. 1 pl.—3, Visweswarabhatta seems to recognize a representation extending to the great grandson and not still further.[79] Finally it should be said here that Vijnaneswara restricts the succession to the agnates only.

75-76. Kane: Op. cit., p. 260; Mayne and Iyengar, p. 615.
77. West and Majid: A Digest of the Hindu Law, 1919, pp. 119-120.
78. Mayne and Iyengar: Op. cit., pp. 154-155; Jolly, T. L. L., p. 171.
79 West and Majid: A Digest of the Hindu Law of Inheritance, 4th. ed., p. 64.

The most important view of Vijnaneswara is that he holds Vyavahara to be secular (*Laukika*). Hence his test of heirship is propinquity, i.e. nearness of blood relationship. As regards the juridical concepts of inheritance as enunciated in *Mitakshara*, an annotation of *Yajnavalkya Smriti*, Vijnaneswara says thus.[80]

INHERITANCE AND PARTITION

I. 1.—2. "Here the term heritage (*dâya*) signifies that wealth which becomes the property of another solely by reason of relation to the owner.

„ 3. It is of two sorts: unobstructed (*apratibandha*), or liable to obstruction (*Sapratibandha*). The wealth of the father or of the paternal grandfather becomes the property of his sons, or of his grandsons, in right of their being his sons or grandsons; and that is an inheritance *not liable to obstruction*. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction. This same holds good in respect of their sons and other (descendants).

„ 4. Partition (*vibhâga*) is the adjustment of diverse rights regarding the whole, by distributing them on particular portions of the aggregate.

I. 1.—7. Does property arise from partition? or does partition of pre-existent property take place?

„ 8. (It is alleged, that) the inferring of property from the sacred code alone is right..... Therefore the property is a result of holy institutes exclusively.

„ 9. To this, the answer is, property is temporal only, for it effects transactions relative to worldly purposes, just as rice or similar substances do.

„ 17. Next, it is doubted whether property arise from partition, or the division be of an existent right.

80. Vide Colebrook's translation.

„ 18. Of these (positions), that of property arising from partition is right,.....if property were vested by birth alone, the estate would be common to the son as soon as born; and the father would not be competent to maintain a sacrificial fire and perform other religious duties which are accomplished by the use of wealth.

„ 20. So the text concerning an affectionate gift..... would not be pertinent if property were vested by birth alone.

„ 21. As for the text, "The father is master of the gems, pearls and corals, and of all (other movable property) but neither the father nor the grandfather, is so of the whole immovable estate";[81] and this other passage, "By favour of the father, clothes and ornaments are used, but immovable property may not be consumed, even with the father's indulgence";[82] which passages forbid a gift of immovable property through favour: they both relate to immovables which have descended from the paternal grandfather. When the grandfather dies, his effects become the common property of the father and sons; but it appears from this text alone, that the gems, pearls and other movables belong exclusively to the father, while the immovable estate remains common.

„ 23. It has been shown that *property* is a matter of popular recognition; and the right of sons and the rest, by birth, is most familiar to the world, as cannot be denied: but the term *partition* is generally understood to relate to effects belonging to several owners, and does not relate to that which appertains to another, nor to goods vacant or unowned. For the text of Gautama expresses "Let ownership of wealth be taken by birth; as the venerable teachers direct."[83]

81. This aphorism is also quoted by Jimutavahana as of Yajnavalkya's. But it is not to be found in the current printed text of Yajnavalkya.
82. The name of the author is not given by Vijnaneswara.
83. This aphorism is not to be found in extant Gautama's text nor is it quoted by Apararka and other mediaeval writers. Hence Srikrishna and Achyuta, the commentators of Dayabhaga have called it spurious (*Amula*).

I. 1.—24. Moreover the text above cited, "The father is master of the gems, pearls, etc" is pertinent on the supposition of a proprietary right vested by birth. Nor is it right to affirm, that it relates to immovables which have descended from external grandfather: since the text expresses neither the father, nor the grandfather. This maxim, that the grandfather's own acquisition should not be given away while a son or grandson is living, indicates a proprietary interest by birth.....according to our opinion, the father has power, under the same text, to give away such effects, though acquired by his father. There is no difference.

„ 25. But the text of Vishnu[84] which mentions a gift of immovables bestowed through affection must be interpreted as relating to property acquired by the father himself and given with the consent of his son and the rest.

„ 27. Therefore it is a settled point, that the property in the paternal or ancestral estate is by birth, (although[85]) the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for the purposes prescribed by texts of law."

PERIOD OF PARTITION

I. 2.—7. "One period of partition is when the father desires separation.....Another period while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons."

EQUAL RIGHTS IN PATERNAL PROPERTY

I. 5.—2. "Although grandsons have by birth a right in the grand-father's estate, equally with sons: still the distribution of the grand-father's property must be adjusted through their father, and not with reference to themselves." Thus the Mitakshara divides the paternal property per stirpes.

84. This quotation is cited by Jimutavahana as of Narada (vide Col. 4, Sec. 1, § 23).
85. Annotator Balambhatta.

I. 5. 4. "Land—a rice field or other ground. A corrody[86]—so many leaves from a plantation of betel pepper, or so many nuts from an orchard of areca. Chattels[87]—gold, silver, or other movables." Here Vijnanewara gives a definition of the terms of Yajnavalkya II. 122.

„ 5. "In such property, which are acquired by the paternal grand-father, through acceptance of gifts, or by conquest or other means (as commerce, agriculture or service[88]) the ownership of father and son is notorious[89]: and therefore partition does take place. For, or because, the right is equal, or alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share."

ORDER OF SUCCESSION

II. 1. 1. "That sons, principal and secondary, take the heritage, has been shown. The order of succession among all on failure of them, is next declared:

„ 2. The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all (persons and class[90]) classes.[91]

„ 3. He who has no son of any among the twelve descriptions.....is one having 'no male issue'. Of a man, thus leaving no progeny.....the heir, or successor, is that person, among such as have been here enumerated, (viz., the wife and the rest), who is next in order, on failure of the first mentioned respectively.

86. It is not happy, translation. Vide Kane. Vol. III.
87. This term is translated by Jimutavahana as slaves , since the word *'dravyam'* (goods) is used along with *'Bhu'* (land). He has followed the orthodox priestly translation.
88. Annotation of Balambhatta.
89. The translation is unhappy. The original in Yajnavalkya is "alike equality."
90. According to the annotation of Subodhini.
91. Vide Yajnavalkya II 136-137. Beng. ed. II. 139. The original is *'sarva Varna'*.

II. 1. 4. This rule, order of succession, in the taking of an inheritance, must be understood as extending to all tribes .....and as comprehending the several classes, the sacerdotal and the rest.

„ 5. In the first place, the wife shares the estate.

„ 6. *Vridd'ha Manu* also declares the widow's right to the whole estate.....So does *Catayayana*.....Also *Vrihaspati.*

„ 7. Passages adverse to the widow's claim, likewise occur. Thus Narada[92].....has directed the assignment of a maintenance only to widows.

„ 38. Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue."

RIGHTS OF DAUGHTERS AND THEIR SONS

II. 2. 1. "On failure of her, the daughters inherit".

„ 6. "By the import of the article 'also' (vide, 2.1.2) the daughter's son succeeds to the estate on failure of daughters."

SUCCESSION OF GENTILES

„ 5. 1. "If there be not even brother's sons, gentiles share the estate. Gentiles are, the paternal grand-mother and relations connected by funeral oblations of food and libations of water.

„ „ 6. If there be none such, the succession devolves on kindred connected by libations of water: and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food: or else, as far as the limits of knowledge as to birth and name extend."[93]

92. Narada: "Let them allow a maintenance to his women for life." (13. 26).

93. Vide the similarity of the last injunction with the ancient Roman Law. See Bohm's "Institutes of Roman Law"—Family Law—451. 3rd. Ed. 1907.

ON SUCCESSION OF COGNATES

II. 6. 1. "On failure of gentiles, the cognates are heirs."

ON THE SUCCESSION OF STRANGERS

„ 7. 1. "If there be no relations of the deceased, the preceptor, or, on failure of him, the pupil inherits, by the text of *Apastamba*.

„ 2. If there be no pupil, the fellow-student is the successor.

II. 7. 3. If there be no fellow-student, some learned and venerable priest should take the property of a Brahman under the text of Gautama.

„ 4. For want of such successors, any Brahman may be the heir.

„ 5. Never shall a king take the wealth of a priest: for the text of Manu forbids it.

„ 6. But the king, and not a priest, may take the estate of a Kshatriya or other person of an inferior tribe,[94] on failure of heirs down to the fellow-student".

ON THE RE-UNION OF KINSMEN AFTER PARTITION

II. 9. 2. "Effects, which had been divided and which are again mixed together, are termed re-united. He, to whom such appertain, is a re-united parcener.

„ 3. That cannot take place with any person indifferently; but only with a father, a brother, or a paternal uncle: as Vrihaspati declares: 'He who, being once separated, dwells again through affection with his father, brother, or paternal uncle, is termed re-united'."

The next digest-writer to be considered is *Narayana* who wrote "Vyavahara Siramoni".[95] He says that he was a disciple of Vijnaneswara as he studied with him. While agreeing in all that the master says, Narayana differs from him in the matter

94. Colebrook translates it for *varna*.
95. Kane: Vol. I, pp. 292-293. It is in mss. form lying in Madras Govt. mss. Library.

that partition takes place when father desires it and when the son or sons desire it. Here he differs from Vijnaneswara.

Now we come to Smriti Chandrika of *Devanna Bhatta* who flourished about the twelvth century A.D. He is a southern author and his work is of great authority in the south as next to Mitakshara.[96] The text mentions Mitakshara as it generally follows the lead of the latter text. It agrees with Mitakshara that the sons of a man acquire ownership in ancestral property with their birth. In this matter the author says that he writes no whimsical views (Swâviprayam) of his own, but what is authoritatively spoken of by all (Introduction verses). Smriti Chandrika does not accept the view of Mitakshara that unequal partition made by the father among his sons had come to be abhorred by the people. It means, he bolsters up the ancient *primogeniture* doctrine. Again, in contradiction to Mitakshara he advocates the theory of spiritual benefit in the matter of succession. Hence he prefers a daughter with sons over a sonless daughter for succession. As regards his assumption, while tracing the saying of these authorities, we find that he is not correct in his judgment in this matter.

The next important legislator is *Jimutavâhana* whose "Dâyabhâga" is called the "Bengal School of Hindu Law". It speaks of the father's power over ancestral property, partition of father's and grand-father's property, division among the brothers after their father's death, partition of coparcenary property concealed but discovered afterwards. In Dâyabhâga, Jimutavahana gives the law that the sons have got no interest in ancestral property by reason of birth. Here lies the great difference with Vijnaneswara's Mitâkshara. He says that heritage arises on the demise of the former owner (I. 5.). Again, sons can claim partition only after the extinction of their father's ownership, or partition can take place between father and sons if the father so desires. Further the widow of the deceased succeeds to her husband's interest after his demise. Finally, the right of succession is regulated by the spiritual benefit offered by the person claiming as heir by means of *pinda* called Parvanna obsequies (XI. 1.

96. Mayne and Iyengar: p. 49.

32-34) and not by the principle of consanguinity as is advocated in Mitakshara (Dâyabhâga 38, 256, 336). Thus Dâyabhâga gives the father absolute right over the ancestral property, as the sons have got no interest in it by birth. These two points are the most important points of divergence between Mitâkshara and Dâyabhâga. Another important contribution of his is, that he allows the cognate relatives to take part in succession in order of succession of *pinda* obsequies.

The date of Jimutavâhana is a disputed one. Kane formerly assigned his date to be between 1090—1130 A.D. But later, he puts it as between 1100 and 1150 A.D. But Mayne and Iyengar put it as the 13th century. One thing is certain that he composed the book when neo-Brahmanism was resurging under the aegis of the Varman, Sura and Sena ruling dynasties hailing from outside Bengal. The tradition as put down in the *Karika* of Edumisra says that he was the law minister of the king Visvakasena of Bengal.[97] The same author says that he was seventh in descent from Vattanarayana who was brought from Kanyakubja by the king Adisura. But the said king cannot be identified in history, and now-a-days the historians doubt the story of importation of Brahmans from Kanyakubja. But there are enough epigraphic and documentary evidences to show that in Bengal there had been settlements of Brahmans from the North and the South from the reign of the Pala dynasty down to the rule of the Sultans of Gaud. It seems the name of Visvakasena is another name of king Vallala Sena's father who ruled in 1095—1158 A.D. or according to some 1158—1179 A.D. The inscription gives the name of Vallalasena's father as Vijayasena.[98] Jimutavâhana wrote another book called *Kalaviveka* dealing with astronomy and astrology. According to Kane, this book must have been composed between 1091—1092 A.D. Hence, it can not be ruled out that Jimutavâhana lived either during the rule of the Sena dynasty or some other royal dynasty when Brahmanism was being rehabilitated in Bengal. Be that what it may,

97. Kane: Vol. III Chronological Table—p. XViii.
98. Vide Gopal Ch. Sarkar Sastri: "A Treatise on Hindu Law"; Vide Deopara inscription in "Inscriptions of Bengal". Vol. III. By N. G. Mazumdar.

there cannot be any doubt that like all the Nibandhakaras who wrote on *Vyavahara,* Jimutavahana must have enjoyed the patronage of some ruler who promulgated the legal doctrines contained in the text among the public. Simply the writing of a book by a learned man does not make it current in the country, especially in the case of law.

Next comes *Raghunandana* of Bengal who in his work "Dâyatattva" carried further the doctrines of Jimutavâhana. The modern jurists say that Raghunandana tried to reconcile both the systems, hence he advanced the doctrine that succession to heirship is to be determined by religious efficacy as well as by proximity of birth (Dâyatattva XI. 63). Thus he reconciled the spiritual efficacy of *pinda* with the propinquity of blood.

Next comes *Srikrishna Tarkalankar* who wrote a commentary on Dâyabhâga, and also wrote the *Dâyakarma Sangraha* elucidating Dâyabhâga in a short compass.

Later on comes *Jagannâtha Tarkapanchânana* who wrote a digest at the request of Warren Hastings, the first British Governor of Bengal. This is translated as the "Code of the Gentoos". Lastly comes Shyamâ Charan Sarkar's *Vyavastha Darpan* which is also a digest. Further, Dâyabhâga has got various commentaries extending to more than a dozen.

The peculiarity of Dâyabhâga or the Bengal School of Hindu Law is, that it extends the right of succession to the cognates according to the nearness of right of offering *parvanna* obsequies inspite of the Sakulyas and Samanodakas i.e. while the angates are still living. On the other hand, in Mitaksharâ, when the agnatic line is exhausted, then the Samânodakas, i.e. the *Bandhus* of the cognate lines come in.

In short it can be said that in Mitakshara, the agnates are preferred to cognates by the standard of propinquity of blood. In this matter Vijnanesvara has developed the theory of "survivorship", i.e. the remoter agnate is eligible to succeesion than the nearest relative through female line. (Mit. II. 1. 7). But it is an old theory to be found in Narada (XIII. 25) and perhaps to be traced in still earlier Kautilya (Arthashastra, 197). But this provision of survivorship has been repealed by the Hindu

womens' Rights to Property Act 1937 which empowers the widow of a coparcenor to succeed to her deceased husband's estate.

The Mitakshara has got various commentaries, and these commentaries sometimes modifying some rule of the original text have been accepted by the rulers of different States that arose at the period that synchronized with the Muhammedan invasion of India. During this period various digests have been written by different authors embodyidng the principles of law, and they have followed the lead of Mitakshara. Thus Mitakshara became the most important commentary, of Yâjnavalkya. As Yâjnavalkya is a better text in the matter of systematization of the topics, it seems that this next became popular in the whole of India in the latter part of the Feudal Age, though Manu-smriti remained the important reference book. And as said before, Mitakshara has tried to systematize the apparent disconnected Smriti rules, the text became popular with those interested in *vyavahara*. Thus, Visvarupa who according to some had been no other than Suresvara[99] (Mandan Misra), one of the four important disciples of the great Sankaracharya, went down and Vijnanesvara became the popular law-giver of India except in Bengal.

Thus, Hindu Laws based on fundamentally different principles are in vogue. The latter has had their own genesis and histories. We will refer to it later on. But a system of Hindu Law must be mentioned here which was current in Banaras and the district around it and also in Orissa. That is "Viramitrodaya" of Mitra Misra. His age is between 1610-1640 A.D. He wrote under the patronage of Virasinghadeva, the Rajah of Orccha who killed Abul Fazl, the minister of Akbar. Mitra Misra followed Mitakshara. But in one rule he differed from Mitakshara when he said: "The son, the grand son, and the great grandson are successively the heirs of a deceased owner. All these three descendants equally confer benefit by offering *Parvanna* oblations .....and propinquity by benefit is consistant with reason..... the rule of succession by propinquity is natural and proper".[100]

99. Vide Kane: Vol. I.
100. R. Sarbadhikari: Op. cit. pp. 371-372; also vide translation of the text by G. C. Sarkar.

It is apparent that this is a compromise between Mitâkshará and Dâyabhâga in the matter of succession. Still later, "Vyavahâra Mayukha" of Nilkantha which is authoritative in Bombay has taken a leaf from Dâyabhâga of Jimutavâhana when he adopted Dâyabhâga-doctrine regarding the nature of coparcener's interest in undivided property.[101]

As we are not discussing the origin and evolution of Hindu law here, but only making an investigation of the sociological background of the said law we must stop here in enumerating its fate any further. So far, we have given a historical perspective regarding the background of the two schools of Hindu Law.

ETHNOLOGICAL PARALLELS

Now let us investigate the sociological background of the division of property. Here it must be said that the results of the modern investigators in anthropological field cannot be applied to Indo-Aryan society, as when it emerged in history, it was a complicated exogamous society. Later on, with the evolution of *Varna* system in society it became more complicated. The hair-splitting division of father's property among the sons by mothers of different varnas, and the enumeration of twelve kinds of sons, and once in a while the acceptance of cognate relatives as successors made the problem of law very much complicated. Indeed not only there had been a hierarchical division of father's wealth according to the social order of the mother of the heir but also there had been a primogeniture system in vogue in early days in the matter of inheritance.

In order to understand the Indian institutions as evinced in Smritis, let us take the help of ethnological researches of the backward peoples. The investigations of the anthropologists have led us to the conclusion that every tribe has got a bilateral kinship. This means, they acknowledge kinships among the paternal as also the maternal lines. It has got universal application in human society. Lowie says that the majority of the

101. Vide P. N. Sen: "The General Principles of Hindu Jurisprudence" A synopsis. 1908. p. 35.

primitive tribes reckon this kinship in customary law also.[102] Now, this paternal line consists of a man, his wife or wives and their children. The aborigines of Australia, supposed to be the most primitive of peoples living, have also a family unit of the type described above. A family unit is an independent one and it stands in certain definite relations with the others around him. Mr. Brown in his investigations of the Kareira of West Australia says that with this people, "there is no confusion as to the intensity of the obligation, which varies with the proximity of kinship".[103] Thus, "though a man's ninth cousin may be called his brother, it is the own brother that inherits the widow through the levirate, and only in the absence of brothers does a more remote kinsman function as a substitute".[104] It is strange that this is the injunction of the Smritis also!

From the Vedic age we find that the unit of Indo-Aryan society is the family. A family, as described in the latter-day Smritis, consists of a man, his wife, their children, and the descendants of these children. Hence, Devala said that the grand father, the son and the grandson are of one body. This family unit is lorded over by the head of the family called *Kulapa* in Rig Veda, and *Grihapati* in latter-day literature. When the members of the family attain majority, they may separate themselves or may re-unite. The legal provisions in the Smritis in the case of *Samsristi* (re-united) and those who separated themselves furnish the proof of it. Hence, in the old days, the Indo-Aryan family had not always been a joint-family. There had been cases of "single family" life.

Besides the family group, there is the grouping of the agnates in clan. It is based on blood-kinship from the male ancestor. In Sanskrit it is called *Kula* based on *Sagotra*. Modern American anthropologists called it *Sib*.[105] In this sib or clan (old terminology) system the rule is, "once a sib member, always a sib member".[106] This means, a male by marrying a female of another sib retains his father's sib. According to the report of

102-104. R. H. Lowie: "Primitive Society. pp. 61-64.
105. It is analogous to the Sanskrit word 'Sippa'.
106. Vide Lowie: p. 109.

Prof. Rivers[107] among the Todas of Nilgiri, a woman after her marriage adopted her husband's sib. But the Todas are not so primitive as they are portrayed to be. Moreover, they are influenced by Indo-Aryan culture as this custom betrays it. Finally it should be noted here that a clan system develops among tribes with an advanced stage of economic, ceremonial and political equipment.[108]

It is the general rule with the Hindus, and as the Smritis testify that a man by marrying a female of another gotra, does not change his gotra-affiliation, rather, the wife is incorporated in her husband's. It is the wife that enters her husband's sib. But contrary evidences are also to be found in epigraphic records. Dowager-queen Prabhabati Debi of the Vakataka royal dynasty gave her gotra as *Dharana* which she said was the gotra of her father, the emperor Chandragupta II.[109] In an inscription of the royal House of Chastana written in Sanskrit, we find that the wife's gotra is different from that of the husband.[110] These people are either Scythians or Parthians.

During the heated controversy that raged in the latter part of the nineteenth century, when the late Pandit Iswar Chandra Vidyasagara tried to re-introduce the widow-marriage, he showed that as a woman does not change her father's gotra after marriage, she can re-marry again. But in the Smritis written by the priesthood we read that a woman enters her husband's sib after marriage, and as such can claim maintenance after the death of her husband. The legal texts say that she becomes a *sagotra* of her husband. The ancient Greeks used to adopt a woman in her husband's phatry. The same was the case with the ancient Romans. Perhaps it was the Indo-European custom of old days.

Again, in this sib or clan, a child from outside can be adopted. In the patrilineal community, he becomes a member of the clan and enjoys all the benefices of his adopted clan. We have

107. Vide Rivers: "The Todas".
108. Vide I. R. Swanton as cited by Lowie: p. 142.
109. Vide Epigraphica Indica. Vol. XV. No 4. "Poona plates of Prabhabati Gupta".
110. D. N. Sarkar: "Select Inscriptions". Vol. I. pp. 168-169.

examples of Suhnasepa and Saunaka in the Rig-Veda. The same thing still takes place with the tribes of Afganistan, Baluchistan and Persia.[111]

The next thing discovered is that a sib system constitutes a *dual organization.* This means that the entire tribe is divided into two sibs, that is, the father's sib and the mother's sib. The sib is exogamous, hence there is the duality in the tribe. In India we find that there has been a strong injunction against *sagotra* marriage. Members of the same gotra (clan) and *Pravara* cannot intermarry. Indo-Aryan society had been exogamous since the beginning of its history. But it seems that there had been sagotra marriage in Vedic period as evinced from the Satapatha Brâhmana and Vâjasaneyaka Samhita. It says that in the third and fourth generations they again unite to marry.

Again there was another kind of marriage known as *cross-cousin marriage.* In post-vedic age it became obsolete in the North, and Baudhayana and Vrihaspati said that in the South people married maternal uncle's daughter. It still exists in the South both among the Brâhmans and the Sudras and the southern Smritis sanction it. With the Khands of Orissa it is said to be prevalent.

This custom inspite of being the buttend of ridicule of the above-mentioned legislators, the drama of Bhasa, the Mahabharata and the Buddha's marriage bear witness to its one-time prevalence in the North. The anthropologists say that cross-cousin marriage exists among the aborigines of West Australia and Lake Eyre of U.S.A. and elsewhere. Lowie says, "when primitive peoples favour cousin-marriage, that is nearly always limited to those relatives technically known as *cross-cousin,* while *parallel* or *identical* cousins are barred from intermarrying by the incest rule".[112] It exists also among the Melanesians, the Todas, the Veddas, and among various peoples of India and Further India,

111. A Hindu Revolutionary took shelter amongst a Persian mountain tribe during the World War I, and he was adopted as a member of the tribe. As such, he got his passport as a Persian and a member of that tribe.

112-113. Lowie: Op. cit. pp. 24-26.

viz., the Mikir of Assam, in Sumatra, also in Siberia among the Gilyak, in some parts of America among some tribes of East, and in South Africa like the Hottentot, Herero, Basuto and Makonda.[113]

Besides this system of marriage, there are two other systems called *Levirate* and *Sororate.* It exists among many North American tribes. There is a sub-division of Levirate called *Junior Levirate* in which a widow is remarried to her husband's younger brother. It exists among the Koryak and the Andamanese. It is also reported from Melanesia and West Australia. Lowie[114] says that property concepts lie at the root of Levirate. Levirate existed among the ancient Hebrews. It existed in some form in ancient India as *Niyoga.* Junior Levirate also existed in early time (vide Baudhayana). It certainly had property concepts as some Nibandha-writers allowed it if the widow was to inherit her husband's property. But property-concept is not the only reason in support of it, as we see that the tribes practise it without this notion. Hence according to Lowie, Tylor's theory of family contract acts. Connected with Levirate is Sororate. According to Tylor, both are co-existent. Lowie says that in a large measure they do. Frazer insisted on an intimate connection between the two as he has collected data from all parts of the world. In sororate, "just as the man's brothers are.....to pay for his bride, so the bride's family are jointly responsible for the services normally to be expected from a wife. If she fails to bear children, they gratuitously furnish a sister or a cousin as a supplementary spouse; and the same rule obtains after the first wife's demise".[114] The sororate again exists in two forms. A man may have the right of marrying his first wife's sisters during her lifetime, or he may be restricted to marriage with a deceased wife's sister. In North America both systems exist. A parallel to this system of junior levirate is the universal rule that a man is entitled to marry his wife's younger sister. As levirate existed in ancient India, sororate in its junior form is allowable by the *mores* and law of

114. Lowie: Op. cit. pp. 33-34.

the Hindus. A man may marry his wife's sister in her lifetime, or he may be allowed to marry his younger sister-in-law after the death of his first wife. It is a broken form of sororate that is permissible in Hindu society. Of course, junior sororate as practised once in a while in Hindu society has got no bearing in law.

Bride-price in a crude form exists among many primitive peoples. It is not always a case of purchase. Among the Kai, a Papuan people of New Guinea, Lowie says,[1145] "the bride-price consists of a boar's tusk, a hog and other valuables, which are paid to the girl's maternal uncles and brothers, while the father is merely entitled to a certain amount of work." But bride-price has got different concepts among different tribes. Among the Hidatsa of North Dakota purchase was the most honourable form of marriage for the woman, and only girls never previously married were bought.[116] Lowie says that purchase was often no more than an exchange of gifts. Thus there is a great variability of the concept of purchase or bride-price and the juristic notions associated with it. According to Kluchevetsky, bride-price in the form of purchase developed in ancient Russia after the form of marriage called "wife by capture." In India we find *Sulka*, though interdicted in some of the Smritis, yet others speak of it and the juristic sequence arising out of it. Some Smritis and Nibandhas speak of the amount of bride-price to be received by the brothers of the bride.

But "Dual organization" is not the case everywhere among the primitive peoples. Again, a father-clan can be divided into different sub-clans. The *Pravara* system signifies it. By it is meant the important members of the *gotra* who in their turns became founders of new *gotras*. Thus one sib gets divided into different sub-sibs. But they are connected through blood-relationship. Thus from a family unit we get *Sakulya* and finally *Samanodaka* agnates.

The next question is about the property that a family has in possession of. The anthropologists affirm that every phase of social life is tinged with the notion of property. Regarding it,

115-116 Ditto: Op. cit. pp. 19-20.

Lowie says, "The reality of private ownership among ruder peoples is far too important to be established by a pair of random illustrations".[117] Coming to Indian situation, the observers have noticed that the Veddahs of Ceylon who though a hunting tribe have a keen sense of ownership. The aboriginal Khands of Orissa, as investigated by Baden-Powell, hold property on individualistic basis: "The head of the family alone owns the homestead and the land attached to it. The sons live with him after marriage but hold no property rights until their father's death, when the estate is divided equally among them. There is no trace of common ownership, nor of the allotment of fractional shares of the village area to the several families".[118] Finally Lowie says, "Thus the intensive study of a single, though vast area, leads to a historical reconstruction that directly contravenes the sociological dogma of a primaeval communistic tenure. This condition appears not as a universal but as a highly specialized case, as a late rather than an early development".[119] The same opinion has been expressed by Lewinski and lately by Diamond.[120] As regards chattels, separate proprietorship prevails. Even among the predominantly stock-breeding tribes like the Chukchi of Siberia, the Kirghiz of Central Asia and the Masai of Africa, sense of individual property rights exists., As regards India, we have already seen that a keen sense of property right is to be found in the Rig-Veda. Again, in the subsequent Vedic and post-Vedic periods we have seen that individualism in property existed. The father has been the lord of his possessions. There has been no common ownership of immovable ancestral property.

On the other hand, Lewinski says, "The right to own land as property, has not always existed. Among pure nomads we find it absolutely lacking".[121] Then he proceeds by saying, "that from a state of no property, individual ownership generally originates once labour has been incorporated in the soil".[122] In India, the Aryans have long past that stage of which our author

117-119. Lowie: Op. cit. pp. 198; 221; 222.
120. A. Diamond: "Primitive Law."
121-124. Jan. St. Lewiniski: "The origin of property anl the foundation of the Village Community." pp. 6; 22; 31; 33.

is speaking of. Then he says, "To-day the most primitive peoples nowhere are acquainted with a common property in land, the village community is only to be found among the more advanced societies".[123] Also he adds, "The formation of the village community is due to the same element as caused the origin of private property—growth of population".[124]

Applying this dictum in India we find that in the beginning, as we have seen, there has been no common ownership in land or property. Common ownership had no place in Indo-Aryan society of old days. If it had come it must have come in a subsequent period. We shall investigate about it later on. We quote the above-mentioned two authors as they represent two subsequent trends in sociological field of investigation other than Morgan. As regards inheritance, Lowie observes: "Rules of inheritance are sometime, greatly simplified by the custom of burying or otherwise destroying all the descendant's effects..... Among the Assiniboln the weapons, clothes and utensiles of the dead were deposited with the corpse, as were sacred shields and pipes".[125] Some of the ancient Indo-European peoples had similar custom. In Vedic Literature we find suchlike injunctions.

Again, personal belongings of a female of primitive culture belonged to her. Further, a woman's personal belongings, viz. dress, artefacts made and used by her, become the property of her daughter or her nearest female kin. Again, a man's weapons are inherited only by men. Thus suchlike rule of inheritance is also to be discerned in some of the Smritis especially in Yajnavalkya where it is clearly stated that mother's property goes to the daughters. Lowie says that it is this principle of inheritance, in conjunction with others that accounts for the widow's exclusion from being one of the heirs of her husband.[126] From this anthropological factor we can guess why some of the Smriti legislators have deprived the widow from being in the list of her husband's heirs.

As regards other mode of inheritance, Lowie says, "The Sib organization, in short, involves the exclusion of certain close

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125-128. Lowie: Op. cit pp. 233, 235, 236.

kindred from inheritance and the inclusion of remote or putative kindred, but it acts in conjunction with existing notions as to sexual functions and the precedence of relatives on the basis of propinquity."[127] How true it is in the case of Mitakshara School of Law! Then while giving illustration about the existence of two different rules for the property of a person by citing the Melanesian custom of transmitting fruit-trees patrilineally and land matrilineally, Lowie says that these may be due to the distinct history of these forms of property. And this has taken place because the Melanesian jurist does not develop an abstract conception of real estate property.[128] Similar phenomenon he has noticed with the Crow Indians of the United States. In summing up he says, "If we substitute a psychological and historical for the irrelevant logical point of view, the co-existence of different rules of inheritance for different classes of property is quite intelligible." These observations help us to understand the 'obstructible' and 'unobstructible' properties of the same person as advocated in Mitakshara. The psychological and historical sides of this theory have faded from man's mind, and logical quibbles about it were introduced by Vijnaneswara.

There is another rule about inheritance that is *primogeniture*. It does occur among primitive people but relatively rare. The Veddahs of Ceylon divide their properties among their sons in a fair proportion among their children, while their daughters' shares are often nominally given to their husbands. Again, the Khands of Orissa make an equal division of land among their sons, though the eldest son gets the post of the headman. But we find that in India in post-Rig-vedic age primogeniture had been advocated in the Smritis; and it has been the custom with some Indo-European peoples of Europe in the past and it exists in the present. But the investigators say that primogeniture occurs in a polygamous family with preference to eldest wife's son. The same has been the case with the early Hindus.

Antithesis to primogeniture, according to Lowie, is the *Junior-right*. It makes the youngest son the principal or at best the preferential successor. Lowie says that it existed in parts of Britain under the name of "borough-English". Huebner says that

it existed in mediaeval Germany also.[129] Also it exists in India among the Badagas, the neighbours of the Todas. It exists to a certain extent among the Todas as well. The Nagas of Manipur practise it to a certain extent. Also with the Khasis of Assam it is found. In this form of inheritance, the elder sons leave their father's family after marriage while the youngest remaining with his parents takes care of them and acquires the possession of their homes after they are dead. But Junior-right is unknown in Indo-Aryan society, though some of the Smritis advocate better shares to the eldest and the youngest brothers.

Again Lowie says that Morgan's data is inadequate.[130] Hence the inferences of Morgan school must be recognized as based on insufficiency of proofs. Finally, Lowie after examining all the data of the latest anthropological investigations comes to the following conclusion: "Primitive society wears a character rather different from that popularized by Morgan's school. Instead of dull uniformity there is mottled diversity; instead of single sibpattern multiplied in fulsome profusion we detect a variety of social units, now associated with sib, now taking its place." As regards the advancement of social organizations, he says, "There is no loop-hole for the spacious plea that general cultural advancement and social advancement may proceed in mutual independence of each other." Then he says, "The occurrence of convergent evolution—of like results achieved through different channels—might be cited as evidence of laws consummating predestined ends. But in by far the greater number of instances the likeness dissolves on closer scrutiny into a superficial or only partial resemblance. Thus neither the examples of independent evolution from like causes nor those of convergent evolution from unlike causes establish an innate law of social progress. One fact, however, encountered at every stage and in every phase of society, by itself lays the axe at the root of any theory of historical laws—the extensive occurrence of diffusion. Diffusion not merely extends the range of a feature, but in so doing it is able to level the differences of race, geographical

129. R. Huebner: 'A History of German Private Law'.
130. Lowie: Op. cit. p. 283.

environment, and economic status that are popularly assumed as potent instrumentalities in cultural evolution. Through diffusion the Chinese come to share Western notions of government.[131]
Any conceivable tendency of human society to pursue a fixed sequence of stages must be completely veiled by the incessant tendency to borrowing and thus becomes an unknowable noumenon that is scientifically worthless. Strangely enough, it was a jurist who clearly recognized this fact at a time when anthropologists were still chasing the will-o-the-wisp of historical laws, and Maitland's memorial words in *Domesday Book and Beyond* may well be quoted in full. "Even had our anthropologists at their command material that would justify them in prescribing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages which may be designated as Stage A, Stage B, Stage C, and so forth, we will still have to face the fact that the rapidly progressive groups have been just those which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas and have thus been enabled, for anything that we can tell, to leap from stage A to Stage X without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet or at the Nicene creed, by travelling a long series of 'stages'; that lept from the one end to the other."[132]
Then Lowie says finally: "Cultures develop mainly through the borrowings due to chance contact.....Hence the spacious plea that a given people must pass through such or such a stage in our history before attaining this or that destination can no longer be sustained. The student who has mastered Maitland's argument will recognize the historical and ethnological absurdity of this solemn nonsense."[133]
We have quoted so far the investigations of Lowie and Lewinski who have formulated their findings after embodying the researches undertaken in the twentieth century, hence later than Morgan's. Similarly, Sir Henry Maine's conclusion that joint-

131. It is also the same case with the present day people of India. This is an example of diffusion of modern culture.
132. Lowie: Op. cit pp. 414-422.
133. Lowie: Op. cit. pp. 427-428.

ownership is the really archaic institution is deemed as inadequate to-day. Both held similar views. And according to Maine the joint-ownership rule as is found in Mitakshara is an evidence of archaic Hindu legislation. The old Marxists like F. Engels and P. Lafargue have based their theories of human stages of civilization on Morgan. But the contention of the modern anthropologists as voiced by Lowie and others that humanity all over does not pass from a common stage to another. Humanity does not pass through a common pattern of evolutionary stages everywhere. It cannot be said that everywhere humanity has passed from tribal communism to family communism, then to individualism. Lewinski on the strength of data gathered by him says, that at first there was individualism prevalent in the tribe, then as a compromise came to tribal communism. This he instanced in the case of the old Russian *Mir*. At first the individual Cossaks used to grab land in the Steppes as much as they could, thus leaving nothing for the new-comers. But when they came and finding no spare land for them, used to fight among themselves. At last, the village elders began to intervene and declared the Steppe land to be under the village authority. This gave rise to the origin of *Mir*—the village committee.[134] The same has been the case with the Hottentots before as instanced by Lowie.[135] The researches prove that the pastoral peoples had highly developed sense of private property in the matter of their live-stock, but in the matter of pasture land they owned it collectively. Also they recognized "non-communal inheritable claims to particular portions of the tribal territory".[136]

Similarly, Lowie says that a tribe which seems to be communistic in one season is individualistic in another.[137] He gives the illustration of the Khirgiz tribe of Central Asia. On scrutiny he says that what seems to be communistic will evaporate into non-communistic phenomenon. As regards primitive communism Lowie says, "Those who set out with the evolutionary dogma

134. Kluchevesky in his 'History of Russia' says that the origin of 'Mir' is shrouded in obscurity. But he was an old historian.
135 Lowie: Op. cit. p. 205.
136-140. Lowie: Op. cit. pp. 206; 196.

that every social condition now found in civilization must have developed from some condition far removed from it through a series of transitional stages, will consistantly embrace the hypothesis that the property sense so highly developed with us was wholly or largely wanting in primitive society, that it must have evolved from its direct antithesis, communism in goods in every kind. This assumption is demonstrably false."[138] Then he says, "In the first place, while full-fledged communism to the exclusion of all personal rights, probably never occurs, collective ownership, not necessarily by the entire community but possibly by some other group is common. Sir Henry Maine, was so powerfully impressed with certain phenomena he had observed in India that he set forth the theory of collective ownership as the ancient condition generally preceding personal property rights."[139] But Lowie says, "Joint-ownership.....is by no means necessarily communal ownership. The co-proprietors may be a pair of partners, an individual household, a club, a religious fraternity, a sib or that fraction of a sib comprising only close kindred through either father or mother."[140] Such a form of ownership in individual household we find in Joint-family system, and in various religious organizations in the past and in the present day. But regarding the question that is raised by Maine in Ancient Law when he says, "It is more than likely that Joint-ownership and not separate ownership is the really archaic institution, and that the forms of property which will afford us instruction will be those which are associated with the rights of families and of groups of kindred," we beg to say that as regards the first part of his statement we are investigating about its correctness in Indian Law, and as regards the second part of his statement, we think he hints at Mitakshara which advocates joint ownership in the form of common ownership of grand father's property. We are here trying to probe the correctness of Maine's view in Indian Law since the time of the Vedas.

With this anthropological investigation let us try to find out the condition of Hindu Law. In our investigation we have found out that there are ethnological parallels between some of the social and economic institutions of the backward, otherwise called

"primitive", peoples and the ancient Greek and Romans as well as some of the social and legal Smritis. The Rig-veda does not give us all informations about social and economic conditions of the Indo-Aryan speaking people. But the latter-day Vedic Literature and the still later Smritis do throw some light on the ethnological customs of the people. While comparing the above-mentioned ethnological parallels we find that these institutions are embedded in the *mores* of the Indo-Aryan speaking people. These comparisons throw some light on the *vyavahara* of the Hindus as they are expressed in the Smriti-legislations, and we can understand the legal quibbles about them. These institutions or customs are not strange things in that portion of humanity that lives in India. It was a part of the *mores* of the Indo-Aryan culture and society. Some of these institutions have become obsolete in course of time or through royal legislations.[141]

The thing that concerns us here is the question of "Joint-ownership" as mentioned by Henry Maine, and as it is expressed in some of Smritis as "equal ownership." We have found out that from the Rig-Veda down to Manu-Smriti there had been no such expression. The father as the head of the family had been the lord of all his possessions. But from the Brâhmana period we see that the eldest son began to get a preferential share. It is called "primogeniture" in occidental legal term. From our ethnologic investigation we have found out that primogeniture comes in a polygamous family. It may be that with the advancement of civilization the rich people began to have plurality of wives. Of course bigamy is mentioned in the Rig-Veda. But in the Brâhmana, the kings were mentioned as having several wives, one from each varna. (Vide Satapatha Brâhmana. "Asvamedha" sacrifice). The eldest son began to be favoured by the father, hence as the head of the next generation in the family he got a preferential share of father's property. This was later on euphemistically bedecked with a religious sanction that the eldest son is the real son who saves the father from *Punnâm* Hell. And as such he offers the oblation to the manes. The

141. Vide Asoke's edicts; also the latter-day Smritis.

other brothers should live under him or may live separately which will multiply religious merit as each of them will observe family rites and offer oblations to the ancestors. It seems that "single family" system has come into vogue at that time otherwise Manu would not have given an alternative proposal.

The next point that we find is the custom of offering oblation to the manes. It is an ancient custom with the Indo-Europeans as well as other peoples.[142] It is still practised as *Tarpan* to the ancestors. At a particular date in the rainy season the Hindus offer oblations to the ancestors with religious rites. But from the latter-day Vedic period we find that the priesthood have developed it further as the rite of *pindam*. It is to be found in the Grihya Sutras (Vide Asvalayana. G. S.), also in Baudhayana Dharmasutras. *Pindam* originally meant 'body', but as Devala said that the grandfather and the grandson being of one *pindam*, i.e. of one body, it seems pindam was turned into oblation cakes. The Yajurveda described this ceremony. At that time, food, wool, etc. used to be offered to the ancestors. Hence, it is an ancient custom that developed in post-Rig-Vedic times as a compulsory religious rite.

Later on, the offering of *pindam* became associated with juridical concept. Thus Manu gives the following injunction: "The wealth of a sonless man will be received by his daughter's son, and that daughter's son will offer *pindam* both to his maternal grandfather and his father, and will get father's wealth as well." (IX. 132). Then he says, "There is no difference in religion between a son's son and a daughter's son; the father of one and the mother of the other are born from the same body (of the father)" (IX 133). Again he says, "The *sastras* do not differentiate between both kinds of grandsons." (IX. 139).

In Yaska we read that in poet-Vedic age, a discussion arose among the learned, that whereas the son's son and the daughter's son perform the rite of *pindam*, and whereas the son and the daughter are born through the same physiological process, then why the daughter will not get share of her father's property. A group

142. It still persists with the Roman Catholics of Europe in some form. "All-Souls' Day" is an illustration.

already in that early age raised the question of equal legal status for both the son and the daughter of a man. But, the reactionary Yaska answered that it was contrary to the Veda where it is written that women could be given away or sold. Thus this post-Vedic law about the daughter's son is echoed in post-Mauryan Manu-smriti. Hence, it is an ancient Indo-Aryan legal rule. Then Manu says that adopted (*Dattaka*) son cannot obtain the gotra and the wealth of his (original) father. Gotra and the acquirement of wealth or property is the cause of offering *pindam*, the adopted son has got no right in *Sraddha* (religious obsequies after death) rites of the giver i.e. the father who gave him birth (IX. 142). Annotating this aphorism Medhâtithi says, *pinda* follows the gotra and wealth. He who obtains the gotra name and the wealth, performs the afterdeath religious rite and offers *pinda* to the dead man. Kulluka interprets it likewise.

From this injunction we get the news that the heir to the gotra name takes the property and offers oblation to the deceased. This means that property remains in the agnatic line. Only in the case of the sonless man the property goes to his daughter's son, i.e. to the cognate. Then like Kautilya, Manu speaks of the division of wealth among the sons of a man by wives of different varnas (IX. 149-157). Here he says, if the twice-born men have got sons by wives of four varnas, or the twice-born do not have any son, yet the sudra-son of these twice-born will not get more than one-tenth part of the share.

In this matter we have seen that Viswarupa, one of the latter-day digest-writers, was more liberal. Then Manu says, in the case of a sonless man, a son must be begotten through a sagotra man, and the whole wealth should be given to that son (IX. 190). Kulluka annotates that the function of *niyoga* must be performed by a man of the same gotra. From this injunction it is to be inferred that formerly anybody could be employed for the performance of *niyoga*.

Manu does not speak about the case when a man dies without leaving a son or a daughter. In that case, Manu makes no provision of reversionership for sister's son. Finally he says, "the *Sapindas* have the first right, then come the *Samanodakas*. The latter extend up to the fourteenth generation. Then come the

Sakulyas (i.e., of the same gotras), then come the men of same *pravaras*, then *âcharya* (teacher), then *sishya* (disciple)." (IX. 187).

From this list it is clear that the property is intended to be kept as far as possible in the agnate line i.e. in the sib. In the failure of everybody it goes to the king (IX. 187-189). But here Manu warns that the property of a Brâhman should not be taken by the King. According to the Sastras, in failure of a good Brâhman, a common Brâhman should take it. In the case of the property of the Kshatriyas and of other varnas, in the failure of a Brâhman reversioner, the King will take it. (IX. 189). This is a bit of class-legislation of the priesthood.

From our perusal of the legal texts and injunctions regarding succession we find that from the Rig-Veda up to Vijnanesvara the law is silent regarding the possible claim of the cognates. The tendency has been to keep the property within the clan. The first written legislation which is of Gautama speaks of succession daughter's son, the people of common descent had the claim. never went beyond the father's clan. With the exception of daughter's son, the people of common deseent had the claim. Failing the agnates, the rishi or teacher. This tendency had been all way through down to Vijnaneswara who allowed the *Samanodakas* to inherit in failure of the agnates.[143] He relied on the vague term *'bandhu'* used by Yajnavalkya (II. 138. Bengal Ed.). But his definition of the Samanodakas and Bandhus are different. On failure of the order of succession of the agnatic relationship down to the fortyfourth person, the father's sister's son as the fortyfifth person becomes reversioner. Again, maternal uncle and father's maternal uncle as Bandhus (cognates) will get the reversionership as the fortyeight and fifty-second in order of succession. But they get the chances to succeed in preference to the Crown (Bengal Law Reports, Privy Council Cases. Vol. I. p. 44). Thus says Mitakshara: "On failure of gentiles, the cognates are heirs. Cognates are of three

143. Vide the appendix attached to the new edition of Colebrook's translation made in 1869.

kinds: related to the person himself, to his father, or to his mother." (II. 6. 1.).

Thus the original Indo-Aryan law of succession was purely agnatic. It attempted to keep the property within the sib or clan. As Indo-Aryan society is based on patrilineal descent, collateral inheritance had been the rule. Vijnaneswara made some loopholes in it by introducing some cognates. But they had far remote chances. Generally property used to be preserved among the blood-relatives in paternal ancestral line. In this matter, Mayne and Iyengar say: "Cognates other than the daughter's son do not however appear to have been recognized as heirs till the time of Yajnavalkya.....Vijnanesvara finally established the cognates' rights of succession on a clear basis by redefining the term 'Sapinda' so as to cover them.....he named the Bandhus as Bhinnagotra Sapindas".[144]

The next question is the right to property by performing the religions obsequies called *Srâddha* in which *pinda* is offered. As we have seen Manu says, "He who accepts property should perform the *Srâddha* rite." Thus there is a juridical connection between the two. In our study of anthropological investigations we find that there are different rules in the matter of ceremonial privileges, and they vary. In the case of the Hindus the privilege of performing feneral obsequies devolve on the eldest son, in default to the youngest. Then, as said before, Manu says that he who takes the property shall offer the *pinda*. Kane says. "It follows that Manu and others regarded the taking of wealth as dependent on the conferring of spiritual benefit".[145] Later on, as early as the time of Medhatithi, he, in his work on *Smriti-viveka* has enjoined that cognates (sapindas of mother) should be reversioners in the absence of a son (quoted by Lollata).[146] He advanced the theory of spiritual benefit in settling the disputed succession among the agnates.[147] Then comes Srikara nearly at the same time with Medhâtithi. He also emphasized doctrine

144. Mayne and Iyengar: pp. 592-593.
145. Kane: Vol. III. p. 736.
146. Quoted in Kane: Vol. I. p. 274.
147. Vide Medhatithi's annotation to Manu; also Sarbadhikari p. 682. p. 682.

of *pindam*, i.e. the spiritual benefit as pre-requisite to inheritance. It is to be found in the Srikara-nibandha.[148] Then comes Apararka who advanced the same theory.[149]

Thus we find that the rule of succession according to the spiritual benefit conferred by the person to the deceased is a very old one. It is not an innvotion of Jimutavâhana, the founder of the Bengal School. Rather, from Srikara downward to Jimutavahana the theory was voiced that he who performs the religious obsequies by offering pinda becomes the heir to the deceased man's property.

The jurist Sarbadhikari opines that with the help of the rite of *Parvanna Srâddha* obsequies Jimutavâhana brought the sapinda cognates in the line of near succession. Thus he says: "The great object of Jimutavahana in applying the theory of spiritual benefit for the purpose of determining disputed questions of inheritance is, we believe, nothing more or less than an attempt to connect together the agnate and cognate sapindas of the same line as heirs".[150] Before Jimutavâhana, the right of a deceased man's son and grandson and of his ancestors were acknowledged. The rights of a great-grandson even was assured. In failure of a progeny of the body, the heirship goes to the ascending line of patrilineal relatives. Barring the daughter's son of a sonless deceased person, the succession has been limited to the gentiles. It was confined within the boundary of the sib. But as we have seen Vijnanesvara made some allowance for the cognates of other sibs (*bhinnagotra bandhus*) to be the heirs in case the patrilineal line (*sagotra*) fails. Vijnanesvara certainly did make some innovations not to be found in the old laws of the Indo-Aryans, which we have enumerated before. But his rule of succession was first applied to the direct descendants, i.e. the sagotra descendants. It means to his own sib. Failing this line, to the *sâkulyas*, i.e. a moiety of the ancestral sib by patrilineal descent who are *gotrajas*. Failing it, to the *Samânodakas* who are *bhinnagotra* cognates. Here, in some cases he brings some of the far away cognates. But the nearer cognate relatives allied by

148-149. Kane: Vol. I. pp. 267; 330.
150. Sarbadhikari: p. 132.

nearness of the blood are ignored. But this was neither equity nor rational. It was a rigid clannish law of succession. Hence according to Sarbadhikari, "Jimutavâhana felt the hardship of this law and to remove the injustice done to the sons of daughters of the family he elaborated the theory of spiritual benefit..... It is really very hard, he thought, that the great-great-grandson of a great-great-grandson of a paternal ancestor fourteenth in ascent should be preferred as an heir to the son's daughter's son, or the sister's son. A person naturally wishes to bequeath his property to one to whom he is bound by ties of affection and blood. A son's daughter's son, or a brother's daughter's son, therefore, should have a greater claim than the most remote kindred of the agnatic line".[151]

As regards the order of succession Jimutavâhana was clear in his opinion that the nearer is the right of offering *pinda*, the greater is the preference to succession. Thus, the cognate sapindas of a nearer line exclude the agnate sapindas of a remoter line. Of course, like Vijnaneswara and other legal jurists before or after him, Jimutavâhana in order to establish his theory of the order of succession had his own definition of *sapinda* and *sâkulya*. In the Dâyabhâga, by the term *sapinda* is included the man who offers the pinda and his three immediate ancestors. By *sâkulya* is there understood those three paternal ancestors above those three immediate ancestors who receive the whole pinda (Dâyabhâga XI. 1. 37-42). This means they are agnates.

On the other side, a man is the *sapinda* of his mother; because his uterine brother will offer religious obsequies after his death. (Dâyabhâga VI. iv. 2). Hence the mother has right of succession. Likewise, the daughter, as she offers funeral obsequies through her son (Dâyabhâga XI. ii. 12. 2. 15). Again, like the mother, the grandmother and the great-grandmother are heirs (D. Bh. XI. iv. 4; Dâya Krama Samgraha, I. X. 4. 10). But no other females are recognized as successors. Even the son's daughter, or the grand daughter through a daughter, or a sister is not recognized as heirs.

151. Sarbadhikari: p. 683.

These *sapindas* are all agnates, that is, they have common patrilineal descent. So far Jimutavahana agrees in general with the older legislations. But he takes in those cognates who are sapindas, and connected by the female line. For this reason, he, like Vijnanesvara, has got his own definition of a bandhu, i.e. cognate. He says: "Therefore a kinsman, whether sprung from the family of the deceased, though of different male descent, as his own daughter's son, or his father's daughter's son, or sprung from a different family, as his maternal uncle or the like, being allied by a common funeral cake, on account of their presenting offerings to three ancestors in the paternal and the maternal family of deceased owner, is a *sapinda*". (Dâyabhâga XI. vii. 19, 12). Here, the word *'bandhu'* taken from Yâjnavalkya, is interpreted by Jimutavâhana controlled by the text of Manu. He means by it maternal uncle or the like (Vide Jolly, L & Co. 186).

As regards the *sâkulya* relationship, a man's great-great-grandson is his sâkulya (Dâyakrama Samgraha. I. X. 22-25; Raghunandana Dâyatattva. XI. 72). Sâkulya relationship stands in patrilineal descent. They are agnates and members of the ancestral clan (sib). Now come the Samânodakas. They are of the same gotra but beyond the degree of Sâkulyas. The Privy Council of Britain limited the Samânodakas relationship to fourteenth descent. This ruling is binding on both the Schools of Law.[152] Jimutavâhana defines Samanodakas in the sense "sâkulya" is used by Baudhayana and Manu. Kulluka used the term 'Sâkulya' of Manu's text as equivalent to 'Samanodaka'.[153] Finally according to Jimutavâhana in failure of samânodakas persons bearing the same patronymic, i.e. gotra are heirs (Dâyabhâga. XI. 6. 8-25; Dâyakrama Samgraha I. 10. 1-20). Thus this is an attempt to keep the property within the original clan though relationship be very far. In failure of direct clan, the remote collaterals are called in for succession. Besides these, there are other two kinds of Bandhus according to the Bengal School who are brought within the doctrine of spiritual benefit. The first party is *exparte paterna*.[154] They offer pinda to their

152. (1936) 62. I.A., A.I.R. 1935. P.C.; Atmaram Vs Baji Rao case.
153-155. Vide Mayne and Iyengar: pp. 698-699, 699-700.

maternal ancestors, who at the same time are also the paternal ancestors of the owner. As examples: sister's son, aunt's son, are *bandhus* who though of different families, yet are connected by pinda offerings. Again, the grandsons through the female line of the uncle and the granduncle, of the brother and the nephew, are all *bandhus*. In the same way, the sons of the owner's daughter, granddaughter, and great great granddaughter are *bandhus*, as they offer pinda to the owner of the property.

As regards bandhus *exparte materna*[155], they are connected with the owner of the property through his maternal ancestors. As a result, in the Bengal School of Law, the bandhus, i.e. the cognatic relatives with the priority of offering pinda come in as claimants before the agnatic sâkulyas and samânodakas (D. Bh. XI. 6; D.K.S. I. 10; Cole. Digest II. 564-569).

In our study of Dâyabhâga we find that Jimutavâhana is more liberal towards the cognates than Vijnanesvara. He allowed the nearer cognates to come in to succeed in order of legal heirship. The door of the sib property is opened to take in the cognates. As the agnates and the cognates form a tribe, hence it should be said that Jimutavâhana opened the portals of the sib property to allow the other moiety of the tribe connected through the females to take successionship of a deceased man's property. The difference between both the schools stands as thus: (1) common ownership in grandfather's property is cardinal point in Mitakshara. This is what Henry Maine has called "Joint ownership"; while in the case of Dâyabhâga, Jimutavâhana lays down that the absolute ownership lies with the father, and he can deal with his ancestral property in any way he likes, and if the father chooses to partition the property then he must act upon the principle of equity, and cannot for himself reserve more than a double share. (D. Bh. II. 15-20, 47, 56-82). Again, (2) Mitakshara school of Vijnanesvara holds the view that no co-parcenor has an ascertained share in ancestral or joint property before the partition, hence he cannot deal with it separately. (Mitakshara. I. i. 27-29). The co-sharers have joint-proprietary right in the whole estate. On the other hand, Jimutavâhana's school denies such a right, and holds that members of the joint-family hold their shares in quasi-severalty. Hence each co-

sharer has a property-right in the estate which he can deal as he likes while living jointly. (D. Bh. II. 27; D.K.S. XI). This has led to the difference of joint-family system governed by Mitakshara and Dayabhaga Schools. (3) As regards the nature of property-succession, Mitakshara divides property into two courses of succession. There is one course of succession in joint-property and another course in self-acquired property of the father. Thus he delineates two kinds of properties (a) obstructed, and (b) unobstructed. In defining this, Vijnanesvara cites an aphorism of Yajnavalkya, viz. "The father is the master of the gems, pearls and corals, and of all (other movable property)". But as already mentioned this sentence (Vide Mit. I. I. 20) is not to be found in Yajnavalkya. Thus there are two courses of succession regarding two kinds of properties, as Vijnanesvara says: "Where the grandfather dies, his effects become the common property of the father and sons; but it appears from this text alone, that the gems, pearls and other movables belong exclusively to the father, while the immovable estate remains common." (I. I. 21). On the other hand, Jimutavâhana in his Dayabhaga has done away with two courses of succession, and has enunciated one course of succession for the property. According to Dâyabhâga there is one rule of succession whether the family is divided or undivided, and whether the property is ancestral or self-acquired. Thus like modern laws of the West, the juristical concept of Dâyabhâga does not entertain two different kinds in property-succession. (4) The fourth is the question of ownership. It is recognized in Mitakshara (II. i. 7). Vijnanesvara based it on Nârada-smriti which says: "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property." (XIII. 25-26). This means as Mayne says, "Survivorship consists in the exclusion of the widows and other heirs to the co-parcener from succeeding to his undivided interest in the coparcenary property".[156] On the other hand, Dâyabhâga does not accept it. Mayne again says, "It recognizes the right of a widow in an undivided family

156-157. Mayne and Iyengar: p. 340; 59.

to succeed to her husband's share if he dies without issue, and to enforce a partition on her own account".[157] Again, as said above, Dâyabhâga does not recognize the difference between obstructed and unobstructed heritage . In joint-family property each coparcener has complete power to dispose of his share which is held in quasi-severalty, and after his death his interest while still remaining undivided, will on his demise pass on to his heirs, male or female even to his legatees. Thus there is no right of survivorship.[158]

Thus, these are important differences and both start with different outlooks. So long, it has been the fashion to theorize that individualistic Bengal School of Hindu Law was influenced by Muhammadan Law which is also an individualistic one. Even, some have decried Jimutavâhana for breaking the unity of Hindu Law and the influence of history on the formation of the said law and its later bifurcations. The dialectics of time and space had been ignored by the ancient Pandits, and to our modern Pandits it is an anathema. Even the impression was given in the ponderous law text books that Mitakshara once ruled in Bengal, and under the aegis of the British Government's rule that Jimutavâhana's Dâyabhâga became the law of Bengal!

But the monumental work of Sri P. Kane entitled "History of Dharmasâstras" which is an encyclopædia of Hindu shâstras, throws a flood light on the history of Hindu Shastric injunctions. He has traced the various theories that are embedded in various texts and has found out that the roots of both the schools lie in far remote periods. Dâyabhâga's law is indigenous and has its predecessors in previous law-texts. Relying on Kane's investigations the latest edition of Mayne's text-book edited by S. Srinivasa Iyengar has been rectified of the mistakes of the olden law text-books. This new edition also says: "From the earliest times, there had been two conflicting principles of law..... From the Mitakshara itself, it is evident that these two schools of thought existed even before Vijnanesvara wrote it. One school represented by the author of the Smritisamgraha and Dharesvara (Bhoja).....the other school represented by

158. Vide above: p. 377.

Visvarupa and Medhatithi.....Vijnanesvara's original definition of sapindaship.....was a distant departure from the earlier theory of sapindaship. The Dâyabhâga's exposition of sapinda relation followed the earlier orthodox view to its logical conclusion".[159]

It is also said that Vijnanesvara himself had admitted that there were two schools: northern and southern. It transpires also that both these schools swear by ancient texts. All these latest investigations set at naught the hullabaloo about the origin and development of the Bengal School of Hindu Law. But these donot throw any light regarding the fundamental sociological background that differentiates the two schools. In order to find the source further investigation is necessary, because whatever may be said regarding the ancient sources, the doctrine of "common ownership" stares nakedly in our face. As the modern Hindu jurists are not yet weaned away from the mid-Victorian ideologies, and as they are still fed with Henry Maine's theories about Indian socio-cultural development, it behoves us to make further enquiries. Hence, the following table is given to ascertain the sources from which both the authors drew their inspirations. In this table the list of the names of ancient and mediaeval authors and the number of times they were quoted by both the legislators are enumerated.

Mitâkshara		*Dâyabhâga*	
Apastamba—	3	Apastamba—	2
Gautama—	12	Bojadeva—	1
Harita—	1	Balaka—	1
Katyayana—	7	Bala—	1
Laugakshi—	1	Baudhayana-	1
Manu—	27	Devala—	13
Sânkha—	4	Daksha—	1
Srikara—	1	Dhareswara-	1
Usanas—	1	Gautama—	11
Unknown author—	1	Gobindaraja-	2
Vashistha—	7	Harita—	

159. Vide above: pp. 59-60.

Vrihad-Manu—	2	Jitendriya—	4
Vrihad-Vishnu—	1	Katyayana—	31
Yajnavalkya—	1	Likhita—	12
		Markandeya:	
		Purana—	1
		Manu—	82
		Narada—	34
		Nirabadda Uddota—	2
		Parasara—	1
		Paithinâsi—	5
		Srikara—	6
		Sânkha—	18
		Udgramalla—	1
		Vrihaspati—	45
		Vishnu—	29
		Vyasa—	10
		Vashistha—	4
		Visvarupa—	5
		Vrihad-Satatapa—	1
		Vrihad Yajnavalkya—	1
		Vrihad Katyayana—	1
		Vrihad Manu—	4
		Yajnavalkya—	4
		Yama—	4

Comparing these two lists we find that while Vijnanesvara has quoted fourteen ancient and post-Mauryan authors, Jimutavahana has quoted thirty four ancient, post-Mauryan and mediæval authors. The range of the use of the old texts by Jimutavahana is greater than in the former. Again, while Vijnanesvara has quoted Manu twenty-seven times, Jimutavahana eighty-two times! Gautama is quoted by the former twelve times, by the latter eleven times; Kâtyayana and Vashistha seven times each by the former, by the latter thirty one and four times respectively. Further, as Mitâksharâ is itself a commentary on Yajnavalkya-samhita it has quoted it only once by name, while the latter has quoted it forty times. Again, the heaviest numbers of quotations referred to by the former is according to serial numbers: Manu, then Gautama, then Katyayana and Vashistha; while in the latter

the serial order is thus: Manu, then Vrihaspati, then Yajnavalkya, then Narada, then Kâtyayana, then Vishnu, then Sânkhya, then Devala, etc. In Mitâkshara, apart from the text of Yajnavalkya, the heaviest sources it has drawn upon, are, Manu, Gautama and Vashistha; on the other hand, in Dâyabhâga, the heaviest sources are, Manu, Vrihaspati, Yajnavalkya, Narada, Katyayana, Vishnu, Sânkha and Devala. From the range of quotations in Jimutavâhana we find him having a wider range of study starting from post-vedic age down to the age of his immediate predecessors which synchronizes with the declining days of the Hindus on the eve of Turkish invasion. It is astonishing that in those dark and intellectually declining days of the Indo-Aryan culture, a Bengalee-Brahman residing in a far away corner of India should have at his command such a vast number of Hindu religious texts.

From this analysis we find wherefrom Jimutavâhana drew his inspiration. It is not only from Manu, Devala and Narada that he based his doctrine, rather the doctrines which he systematized were already existing in ancient and mediæval India. It is not simply the brain-wave of a Bengalee-Brahman of unknown name and with a stigma attached to his sept of Caste, that developed the doctrine of spiritual benefit and the absolute right of the father in his property, but it is as old as the Vedic-Literature.

To the credit of Jimutavâhana it must be said here that he fought for the upkeep of ancient Indo-Aryan legal tradition. The doctrines which he enunciated were older than those of Vijnanesvara. It is not that Jimutavâhana got fame through the accident of being popularized in British Indian Courts though the same can be said of Vijnanesvara's Mitakshara which as admitted by Kane got its importance in British Indian Courts. On reading all the data that are in our hands, we can safely say that Vijnanesvara's doctrines were innovations. He drew his inspirations from Yajnavalkya. Manu he flouted, the post-vedic Gautama that he cited in support of his theory of common ownership has been shown, either to be spurious or non-existing in present-day recension. The only mediæval text that he could cite was Yajnavalkya. But Manu is a greater authority than Yajnavalkya.

Again, here we quote from Jaimini, the author of Purva-Mimamsa, who says that "where there is a conflict between *Sruti* and *Smriti*, the former is authoritative". Hence, the evidence of Vedic Literature is more authoritative and reliable to us in the matter of source of Indo-Aryan Law, than the Smriti-texts of Mediæval and Feudal days when India has been repeatedly invaded by the foreign tribes. The uniqueness of these invasions is, that unlike the Macedonian invasion which was more of a raid that touched only a fringe of a border of India, while the later invaders settled down in India and adopted its religions and culture. Some became Buddhists, in the central part of the country they became Brahmanists observing all the religious ceremonies of Brahmanism. They even adopted gotra system of the Indo-Aryans. We have already got these informations from the epigraphic records. It is an important phase of the dialectics of Indian culture and history. Strangely while the modern Indian jurists have been breaking their heads over the difference of two schools of Hindu Law, they never inquired into the dialectical antitheses that were going on in Indian history, but were satisfied with Maine's interpretation of Indian socio-economic conditions and are still following the will-o-the-wisp of Morgan's theory of primitive communism.[160] As a result their vision has been blurred. They opine that primitive communism existed in ancient India, then came family-communism of which the Mitakshara is the evidence. It existed all over India, while in Bengal, Jimutavahana's Dayabhaga tinged with Muhammedan individualism in law became prevalent with the help of the British Indian Government. But, it never occurred to them that contrary may be possible. On this account let us find out the source of this novel theory of "common ownership."

In analysing the Sruti-texts we find this theory to be non-existent, while it occurs in a few mediæval smriti-texts as mentioned before. Referring to the citation in defence of "common ownership" which though cited by Mitakshara but not quoted by

160. In Law Classes of India, Maine's book is still current, but nothing is taught regarding the modern investigations. Mid-Victorian ideologies are still current in Indian thought.

others during his age and also not to be found in the exant one, the jurist Ghosh says, "From the above it will appear what little foundation there is for the proposition that ownership is by birth"[161] because "under the decisions of the Courts in British India, the Mitakshara is of paramount importance in several matters of Hindu Law....throughout India except where Dâyabhâga prevails".[161]

We have already said that Yâynavalkya-smriti was written in the Feudal Age. Before the time of writing this text there have been repeated foreign invasions. During the time when the Satavâhanas were ruling in the south, the dynasty of Kharahatâ Nâhapana was ruling in some portion of Central India and Guzerat. This dynasty is either of Parthian or of Scythian origin. One of their kings had matrimonial alliance with Pulomâyi Satakarni, the Brahman ruler belonging to the Satavâhana dynasty. Prof. Radha Kamal Mukherje says: "In the Dekkan the proprietary bodies called the 'Thâkurs were the results of the settlement of tribes and clans of invaders from Northern India of Scythian origin who drove Dravidian enemies before them into the southern districts which they hold."[163]

Of course, we cannot say anything regarding legal concepts of these invaders. Epigraphy does not help us in this matter. The Hindus have not recorded anything about them. Neither do we glean anything about the legal conception of the family property of the Hindus in the inscriptions though we get some informations about the tenures of the lands granted to the Brâhmans[164] and to the temples. Hence, we will have to look into the historical reports of other countries to get informations regarding the legal concepts in analogous situation.

III. HISTORICAL ANALOGIES.

(*i*) *Germanic peoples.*

In mediæval days Karl Marx says, "communal property.....was

161. Vide J. C. Ghosh: Op cit. Vol. I. p. 1036.
162. Kane: Vol. I. p. 287.
163. Radhakamal Mukherji: 'Land Problems of India," p. 30.
164. The present-writer has read about 700 inscriptions but could not find any information about the family proprietary right in them.

an old Teutonic institution which lived under cover of Feudalism".[165] Further he says, "The Highland Gaels were organized in clans, each of which was the owner of the land on which it was settled. The representative of the clan, the chief or "greatman' was but the titular owner of this land just as the reigning Queen of England is the titular owner of all the national soil. When the English Government succeeded in putting down an end to the continual internecine wars by those 'greatmen' one against another.....on their own authority, they converted their titular ownership into an absolute right of private property."[166] From the sayings of Marx we can understand that in old days in North Europe there was communal holding of property. In Scotland the land of the clan later on was converted to private property. In England the historian Davies says regarding the Norman conquest: "William.....definitely formulated a legal theory of feudalism, which still exists in English law. That is the reason why a man making his will can 'bequeath' his personal property, but only can devise his land. That, too, is the reason why the eldest son of an intestate inherits all his land, but only shares his personal property with his younger brothers and sisters."[167] From this information we get the idea that Feudalism ushered in two different kinds of legal concepts in property in England.

In France as Hallam says, "The estates possessed by the Franks as their property were termed *alodial,* a word which is sometimes restricted to such as had descended by inheritance.....They passed to all children equally."[168] In this matter we do not find the concept of "Joint-ownership" in property. Further information we get from F. Engels who said that ancient Germans had Gentile Constitution.[169] This means they followed clan rules. In France in the Carolovingian period the German system of land as a communal property has evolved into complete right of

165-166. Karl Marx: "Capital" Vol. II. p. 802, 802, published by I. M. Dent 1930.
167. R. Trevor Davies: "Mediaeval England" p. 30.
168. H. Hallam's 'View of the State of Europe during the Middle Ages".
169. F. Engels: "The Origin of the Family, Private Property and State".

private property. The law of inheritance seems to have made this change.

The social and legal position of the ancient German was embedded in the patrilineal clan. He belongs to it by birth. Blood-relation is necessary for the membership of the clan (German Sippe).[170]

Again, in the Christian period, the historian Huellmann while describing the history of the origin of the social classes in Germany, says, "The individuality of the residence and its attached things, and the total property of the family and dwelling land on which the land property and the right of inheritance rest, was buried by the attempt of the church to enlarge itself, and the competence of the existing possessor to present to the founder and the monastery was acknowledged. All the peoples of Germany were provided with the former legal principles,.....a subordinate principle in strong or in lesser grade is enough for the succession in the male line with which on account of the legality of indivisibility, the right of the first birth was usually connected".[171] Then he says, "All members of the royal and state service had possessed lands through usufruct.....the Kings came into possession of much landed properties all round the state.....the church property was augmented by the present of much private lands".[172] But he further says, "Inspite of the slavery of the church which the priestly class has imposed on them, yet it did not destroy in his heart the human nature of dependence on private property and love to the children".[173] Further he continues, "That the rising of the worldly and spiritual big men and the establishment of their power were based on the destruction of the private property and the freedom of the small landed proprietors".[174]

Finally he says, "Free land properties are the work of the middle class of Germany".[175] A much later writer R. Schroeder writing about the history of German Laws, says, "There was no private property in land and dwelling house known among the

170. H. Brunner: "Deutsche Rechts Geschichte." p. 66.
171-175. K. D. Huellmann: "Geschichte des Ursprung des Staende in Deutschland. pp. 8-470.

ancient Germans, but all land belonged to the people, and its use was allowed to individuals from the total land".[176] Then he says "As long as the Germans did not settle down in village life, all lands that were not reserved for the public legal purpose belonged to the State of the *Gau* (section of a tribe) and it was the duty of the Gau-princes to distribute land yearly to the clans and the families. On the contrary, with the establishment of permanent villages, the partition of the village-marks began, only the rest of the usable land known as *allmende* remained under the Gau-administration".[177] From this saying we glean that the German tribes in their pastoral stage of life held the land in common. Later on, when they settled down in village life, it was parcelled among different families.

Now let us see what the great English historian Stubb says regarding the ancient Germans. Referring to the annals of Julius Caesar he says: "They do not devote themselves to husbandry, but live chiefly on milk, cheese and flesh. No one has a fixed quantity of land or boundaries that may be called his own, but the magistrates and chiefs assign annually, and for a single year's occupancy, to the several communities, larger or smaller whom the tie of common religious rites or consanguinity has brought together, a portion of land, the extent and situation of which they fix according to circumstances. The next year they compel them to move elsewhere".[178] As to the origin of this polity, Stubbs quotes from Caesar, "That the people may not be induced by habitual employment in husbandry to exchange for it the pursuit of arms another, that they may not devote themselves to the accumulation of estates; that the more powerful may not expel the meaner from their possessions;..that the general body of the people may be kept contented, which can be the case only so long as every man sees himself in material wealth on a level with the most powerful of his countrymen".[179]

Here we find that Stubbs' account of the old Germans is an echo

176-177. R. Schroeder "Lehbuch des Deutschen Rechts Geschichte"—pp. 60-291.
178-179. Stubbs: "Constitutional History of England" Vol. I. pp. 12-13.

of the investigation of the German scholars. A century and a half later after Julius Caesar, Tacitus wrote about the Germans. At that time, Stubbs says: "Although the pursuit of agriculture is now general, the wealth of the Germans consists chiefly if not solely in their herds of cattle,.....The wide forests and untilled plains are the common property.....But there is not apparently any separate ownership even of the cultivated land .....But the arable land is occupied by the community as a body, and all allotments, changed annually are assigned to the several freemen according to their estimation or social importance".[180] Again, Stubbs says, "property in land can scarcely be said to be altogether unknown".[181] He says that according to the German scholar Bethman-Hollweg private property in land is regarded as introduced after the migrations of the tribes towards the countries of the Roman Empire (Voelker Wanderung) and in regions where the migration has not effected a change, improvement of agriculture and strict regulation of jealous custom helped to introduce the new change.[182] Further, Stubbs says that the homesteads of the rich and poor must have had granaries, cow-houses and stocking-yards. And in these things only the owners had rights.[183]

This description of the ancient Germans after Julius Caesar's time make the historians surmise that in the later days there must have been an advancement of the land system. The Germans had passed the nomadic stage at that time.[184] In this way, at the time of Tacitus, each member of the community had a fixed share in the cultivated land, a proportionate share in the pasturaage, a dwelling and homestead of his own. But in this community there were differences of ranks, distinctions of wealth, of blood and status, a distinct array of official personages, and with the possibility of inequality of allotment of land.[185]

Thus from the sayings of the authors we glean the fact that in

180. Stubbs: Ibid. Vol. I.
181. Stubbs: Op. cit. p. 20.
182. Bethmann-Hollweg: "Civil Process". iv. 15.
183-184. Vide Waitz: "Deutsche Verfassungs-Geschichte". i. 118; i. 86.
185. Tacitus: "Germania" cc. 7, 24-44; Grimm Rechts Alter tuemer". pp. 227-308.

the nomadic stage of their life, the ancient Germans held the tribal land as the property of the tribe itself. In this stage there was collectivism or communism in land. In a later stage, the usufruct was given to different families. But each family had its own homestead and the land around it, its cattle as family property. Lewiniski quoting the German historian Mauerer, says: "The oldest German laws mention enclosure of corn-fields, meadows and vineyards, proving the existence of private property. Mauerer admitted it, but he considered that it was a later stage".[186] Surely it must have been in post-nomadic stage. Again, Dargun finds traces of individual agricultural economy in old Germany.[187] On the other hand, Brunner says that this matter is a subject of lively controversy.[188] But as a result of studies of F. de Coulanges[189] and Hildebrandt,[190] it is now generally admitted that no property existed at all in ancient time in Germany.

As regards colonization of Britain by the Germanic tribes, Stubbs says, "the fieldwork of the older custom must have been the framework of the new".[191] The existence of the classes among the new-comers imply the existence of larger and smaller private estate".[192] Stubbs says, that "although traces still remain of common land tenure at the opening of Anglo-Saxon History, absolute ownership of land in severalty was established and becoming the rule." Thus he says regarding land: "That which was held by individuals in full ownership, and that of which the ownership was in the state".[193] From Stubbs we further glean that the landowning freeman is the first element that the law regarded. And the first relation of a man was with his family.[194] But Stubbs does not speak of joint-ownership of the ancestral property of the Anglo-Saxons.

186. J. J. Lewiniski: Op. cit. pp. 26-27; Mauerer's "Einleitung" P.S.C. 108.
187. Dargun: "Ursprung und Entwickelungsgeschichte des Eigentums" Z.S.R.V. v. 7. 11.
189. F. de Coulanges: "The Origin of Property" 2nd Ed. pp. 39-133.
190. Hildebrandt: "Rechte und Sitte".
191. Stubbs: Vol. I. p. 71.
192. Vide Stubbs Vol. I. p. 78
193. „ „ „ p. 80.
194. „ „ „ p. 87.

Coming to the period that synchronized with the Norman conquest, Stubbs says, "There are instances moreover of a division of the inheritance of the great earls".[195] In the Norman period we find the merchant Guilds having their communa and their properties".[196] Further he says, "The towns themselves *whether* as organized guilds or ancient communities of land-owners like the village communities could hold land in common; although in the latter case the basis of the common ownership was inheritance".[197] In this period, the Domesday book speaks of *Villani,* the settled cultivators of the land who were the owners of the soil they *tilled,* but under feudal ideas were regarded as customary tenants of the feudal lords.[198]

Thus neither on the continent nor in England do we find original common ownership in ancestral or paternal property. Going backward to classical period, de Coulanges speaks of existence of private property among the Greeks of Homer.[199] The same is the case with the ancient Hebrews.[200] Now let us turn to Sir Henry Maine. He compared the Roman *sacra* with the Hindu rite of performing the obsequies of a deceased person. It embraced the sphere of Inheritances and Adoptions as late as the time of Cicero.[201] Thus *sacra* and *srâddha* had analogous imports. As regards succession in Roman Law, he says: "In point of fact, we know of no period of Roman Jurisprudence at which the place of the Heir or Universal Successor, might not have been taken by a group of co-heirs. This group succeeded as a single unit, and the assets were afterwards divided among them in a separate legal proceeding. When the Succession was *ab intestate,* and the group consisted of the children of the deceased, they each took an equal share of the property; nor, though males had at one time advantages over females, is there the faintest trace of Primogeniture. The mode of distribution is the same throughout archaic jurisprudence.[202]

195-196. Vide Stubbs Vol. I. pp. 394, 440-442, 464.
197. Stubbs Vol. III. p. 605.
198. Sir Henry Maine: "Ancient Law". p. 204.
199. F. de Coulanges: "Origin of Property". p. 98.
200. Lewis Morgan: "Ancient Society". pp. 542; 30.
201. Sir Henry Maine: Op. cit. pp. 241-242.
202. Ibid. Op. cit

Thus, the idea of common ownership which Maine called "joint ownership" is suspected by him in classical Rome. As regards Primogeniture he says that it did not belong to the customs which the barbarians practised when they first settled within the Roman Empire. It had its origin in the benefices or beneficiary gifts of the invading chieftains.[203] Later on, during the Feudal Age this system diffused through Europe as it had some great advantage over other modes of Succession. It spread through the principles of Family Settlement of France and Germany. This resulted in the condition that lands held by knightly service should descend to the eldest son.[204]

Then the ancient Roman law provided the agnatic union of the kindred. Maine says that old Roman law established a fundamental difference between "Agnatic" and "cognatic" relationship. But this distinction disappeared in the later *Jus Gentium*—"the law common to all nations", also the difference between the archaic forms of property.[205] Again, by way of illustration Maine speaks of the idea of agnatic succession in the latter-day Salic Law of the Franks descended from the ancient German rule of succession to allodial property.[206]

Coming down to the period which synchronized with the break-up of the Roman Empire and the emergence of the Northern Barbarians in European history, Maine traces the analogy between the Hindu Law of Common-ownership with the law of the ancient Germans. He says, "The ancient law of the German tribes was exceedingly similar. The *allod* or domain of the family was the joint-property of the father and his sons. It does not appear to have been habitually divided even after the death of the parent.[207] Thus, at last we find that among the ancient German tribes there was co-ownership or common ownership between the father and the sons in allodial lands. Regarding it, Maine further says, "The mature Roman Law and modern jurisprudence following in its wakes look upon co-ownership as an exceptional and momentary condition of the

203. Op. cit. p. 243.
204. Vide Maine: p. 245.
205-207. Maine: Op. cit. pp. 61; 156; 242.

rights of property. This view is clearly indicated in the maxim which obtains universality in Western Europe, "No one can be left in co-proprietorship against his will". But in India this order of ideas is reversed, and it may be said that "separate proprietorship is always on its way to become proprietorship in common".[208] This he explains by saying that "in the case of co-proprietorship division rarely takes place, it is managed by the eldest agnate, and finally, this assemblage of joint-proprietors, a body of kindred holding domain in common, is the simplest form of Indian village community".[209] Regarding this hypothesis of Maine we will speak later on. As regards legal situation he says, "It is more than likely that joint-ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford us instructions will be those which are associated with the rights of families and of groups of kindred. The Roman jurisprudence will not here assist in enlightening us, for it is exactly the Roman jurisprudence which transformed by the theory of Natural Law, has bequeathed to the moderns the impression that individual ownership is the natural state of proprietary right, and that ownership in common by groups of men is only the exception to the general rule".[210]

Here at the outset we should emphasize that Maine had been mistaken regarding Hindu Law. He speaks of the joint-ownership as the archaic Hindu Law. But we have seen that it is not the fact. He hints at Mitakshara law of inheritance when he says, "the inherited property of the father is shared by the children as soon as they are born," but we have already seen that there were older law-texts that have spoken on the contrary. Maine ignored the Bengal School of Hindu Law. Was he ignorant of the existence of the Bengal Legal system? Yet speaking about the history of Testamentary Succession he says, "there are in the local customs of Bengal some faint traces of the Testamentary powers".[211] As regards the primitive operation of wills he says, "the Will of Bengal is only permitted to govern the succession so far as it is consistent with certain overriding

208-210. Vide Maine: Op. cit. pp. 273-4; 277; 271-2.
211-215. Vide Maine: Op. cit. pp. 206, 209, 5, 15-16, 24.

claims of the family".[212] Thus he was not incognisant of the rules of Bengal Law.

Further, he was aware of the Laws of Manu when he says, "The conception of the Diety dictating an entire code a body of Manu, seems to belong to a range of ideas more recent and more advanced".[213] Again he says, "The Hindu Code, called the Laws of Manu.....undoubtedly enshrines many genuine observances of the Hindu race.....It is, in great part, an ideal picture of that which in the view of the Brahmins, ought to be the law.....Manu according to the Hindu mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindu jurisprudence, a recent production".[214]

Regarding this point the annotator Sir F. Pollock, the editor of Maine's "Ancient Law" of 1906 edition in Note C, says, "Maine's brief remarks on early codes include a few sentences on Hindu Law; these were written at a time when the existence of the books called by the names of Manu and Narada were hardly known outside Anglo-Indian official circles except to a few students of Sanskrit".[215] But the question is, how then could he talk of Hindu law of joint-proprietorship in a parental property? Surely, he knew of Yajnavalkya, at least its annotation the Mitakshara. Manu and Narada did not speak of common ownership of grand-father's property. He used the rules of Mitakshara to build his hypothesis, that it is the most archaic law and the village community is an application of this law. According to him the so-called village community system was the archaic form of community in India. We find him to be tendentious in this matter by ignoring Manu, Narada and the Bengal School of Law, and by applying the Mitakshara law in his hypothesis.

Now let us come to the socialist writer LaFargue. We have already said that he spoke of primitive form of communism in which the clan was the owner of property. Then he traces further evolution of the rise of the sense of property. He says, "The common tribal property began to break up as the family

was being constituted.[216] The next stage, he says, is, that "the communal territory of the tribe was then parcelled out so as to form the collective property of each family".[217] In this stage we find common ownership of family property. He substantiated this hypothesis by the findings of investigations of Haxthausen, Maurer, Engels, etc in Germany, in England by by Maine, Seebohm, Gomme, etc., in Belgium by Loveleye, in Russia by Schepotief, Kovalesky, etc.

Thus we find that according to Maine and LaFargue, after the break up of nomadic life, the collective property of the family takes its rise. This has happened in Europe during the Feudal period of her history. LaFargue says thus: "The feudal lords encouraged the organization of the peasants into family collectivities.....The collective form of property which destroyed the primitive tribal communism established the family communism which secured all its members against want.....The collective form of property, traces of which have been met with whenever researches have been instituted, has survived for shorter or longer periods, according to the industrial and commercial development of the country in which it obtained. This form, created by the splitting up of the common property of the tribe, was bound to disappear in its turn with the disintegration of the patriarchal family in order to constitute the individual property of the several members of the dissolved family".[218]

Coming back to Asia, let us enquire about the family relations of the Chinese, a people as ancient as the Indians. The Chinese writer Wu speaking about the structure of the Chinese family, says, "Theoretically it may be defined as a group of kinsfolk consisting of parents and their children living together in a single domestic establishment.....The Chinese family is

216-217. P. La Fargue: "The Evolution of Property". pp. 36; 40.

218. P. La Fargue: "The Evolution of Property" pp. 57-59. In this connection La Fargue speaks of group marriage that messrs. Pison and Howitt discovered to be existing with the Australian aborigenes. But later informations speak differently. Lowie says "Sexual communism as a condition taking the place of individual family exists nowhere at the present time and the arguments for its former existence must be rejected as unsatisfactory". pp. 58-59.

founded simply upon consanguinous affinity and the perception of the convenience and utility of perpetuating a natural grouping".[219] Thus the Chinese family is somewhat of a consanguinous joint-family like that of the Hindus. As regards the property of the family, it "is held in common and as far as possible undivided, only the exceptionally energetic and ambitious trouble themselves to undertake new enterprises.....Furthermore, the average person in a large family hardly dares to run the risk of undertaking a great enterprise for though his gain benefits all, his loss likewise brings misforture to the whole family.....the family property, the means of existence has always been collective".[220]

How true it is of the Mitakshara joint-family system! Again, Letourneau speaks likewise: "In celestial empire, women are disinherited.....property is transmitted to sons alone..... property is still of the family type, but already undermined by a tendency towards individualism".[221] The modern foreign writers speak of the Chinese society being a patriarchal one, and the father divides his property among his sons.[222] Again, an Austrian lady who visited Soviet Russia says that in Tajikistan, the men keep the family property to themselves and debar the women members from it, though as Muhammedans they should follow the Shariat injunctions in this matter.[223]

At last we get a mooring in our wanderings in the fields of foreign histories. We have seen that in nomadic stage of the people's life-history the land is held in common by the tribe. Then in the course of evolution of social history land is parcelled out to different families which hold it collectively as the family property. This kind of collectivism of family property is called by the jurist Maine as "joint-ownership", by La Fargue, the collective property of each family as "Family communism", and by the mediaeval jurists as "common ownership."

Further, we evince from the investigations of the above-mentioned

219-220. Sing Ging Wu: "The Chinese Family System".
221. Letourneau: "Property—its Origin and Development". 1893. pp. 333-4
222. Belden: "China makes the world." 1950
223. Vide Halle: "Women in Soviet Russia."

writers, that this form of property relations arises in mediaeval or Feudal stage of a people's history. Here, we must remember that China like India and other countries has passed through Feudal period of history and is just weaning herself away from it. There is no wonder that in the structure of the Chinese society we find collective property of the family.

Now we come to the investigators of the Twentieth Century. We have already spoken of Lowie's investigations. Another writer, Lewiniski,[224] basing his investigation on the latest reports of the anthropologists of modern times says, "among the Khirgizes, where irrigation required a common effort, all the fields are the private, hereditary property of each labourer. (Kirg. III. p. 31). He is entitled to dispose of his land according to his wishes, and is merely restricted in this, that he may only sell to the members of the community. (Rumanian-Zew. pp. 168, 169). No equality whatever exists in the possession of land, everyone is free to occupy as much as he wishes and to use water according to his need. (Kirg. IX. p. 251). Thus a nomadic tribe like the Kirghizes of Central Asia do not hold land in common. In Java, it is reported that each one cultivates his land individually and there is no trace of a village community. (Eindresume S. C. IV. Bij lage, B. P. 22 et seq.). Again he says, "Among the hunting peoples it appears that the land situated round about it is also private property. Prof. Kaufman, for instance, points out that such is the case with regard to the natives in the district of Tarinsk (gov. Tobolsk) (West Site XIII. p. 128)." "The Siberian peasant, once he has occupied the land considers himself the absolute proprietor of it. He can do as he likes with it, can sell or rent it, give it away or bequeath it. (Kaufman, p. 250; Kacharowski, pp. 97, 98). These are just the same right as the German cultivator possessed in the olden times (Maurer, Einteitung p. 205). In Java (Eindresume, I. p. 64, II, p. 158) and in European Russia the first clearer of land acquired hereditary right to it. How it sounds Manu-like in all these illustrations!

224. St. Jan Lewiniski: "The Origin of Private property." pp. 19-26.

As regards England, Lewiniski says that Pollock and Maitland express the following opinion: "'We cannot think that at the present days, anyone who has made a serious study of legal authority and who weighs his words will assert that land was owned by corporations, that is by ideal persons before it was owned by natural persons (F. Pollock and F. Maitland: History of English Law before the time of Edward I. Vol. II. p. 242)."

As regards Russia he says, "In European Russia village communities did not exist in olden time (Pawlow-Silwansky, p. 11 a.); they originated and developed only out of private property and since the sixteenth and seventeenth centuries (Simkowich, "Die Feldgemeinschaft" S. C. p. 50); still in the eightieth year of the nineteenth century this process was going on in the south of Russia (w. w. p. 12)".

"With regard to India, F. de Coulanges drew attention to the weak points of communistic theory. 'M. Viallet and M. de Laveleye' he wrote, 'make frequent references to ancient India; why do they not mention that in all the ancient Hindu Law which has come down to us, the rights of private property are mentioned, although of course, the holding of property in common by co-heirs is all recognized? Why has no one quoted the old maxim, "The land belongs to the man who first cleared it as the deer belongs to the man who first wounds it? (F. de Coulanges: "Origin of private property" p. 131)".

From these Occidental writers it is clear that each writer has referred to the newer Hindu Law to suit his hypothesis. Again it is also clear that de Coulanges had confused information regarding Hindu Law. When he threw that famous aphorism of Manu on the face of those two writers, he himself was confused as he referred to Yajnvalkya in the same breath with Manu's individualism in law.

From all these controversies we get the following salient facts: That from a stage of no-property arises the sense of property. In certain stage of evolution among the same people, the institution of "joint-ownership" is to be seen. But that is not communistic form of ownership. Some of the keen investigators of the nineteenth and twentieth centuries have discerned

the existence of private property among people in the extreme rude stage of life. Again, in our long excursus in foreign histories, we have seen that in the feudal stage of civilization, some peoples have evolved joint-ownership in ancestral property. That is also called collective form of family ownership. Again, we have learnt that archaic and mediaeval laws of Europe knew two kinds of property. The modern laws have fused them together into one, though the archaic system still persists in English law.

In this long ramble over the existence of forms of private property among the peoples, ancient and mediæval, we are looking for the clue to our Yajnavalkya's dictum "Common ownership" in grand-father's property; and we have found out lots of legal phenomena that are helpful to us in our analysis of the Indian legal situation.

At first, it is apparent that those Occidental writers who referred to the Hindu Law had no clear notion of the legal history of India. Even a noted German writer like A. Mayr[225] habituated to methodology with keen sense of observation that is characteristic of German scholarship, has failed in his digest of Hindu Law to discern that there are two schools of Hindu Law since the mediæval period, though he divided Hindu Law into older and newer systems. He says that the newer law has made a distinction between inherited property and self-acquired property. The newer law acknowledges the absolute right over one's self-acquired property. In his book he has mentioned Mitakshara, but nowhere is to be found any trace of Bengal School of Law. As regards those Smritis which have spoken of "Common ownership" he has mentioned only Yajnavalkya and Vishnu.

Now let us apply all these findings to the Indian legal situation. We have said that from the days of the Rig-Veda down to Manu neither there is any question of Tribal communism in land nor that in other forms of property nor do we find the two different natures of property. Those who have tried to discover the primitive stage of evolution, as spoken above, in the Vedas, are awfully misinformed. The Indo-Aryans from the Vedic days

225. Aurel Mayr: "Das Indische Recht." 1873 pp.10-25.

down to the period on the eve of rise of Neo-Brahmanism at the top of the feudal system were leading a settled life, carrying on trade and commerce with the outside world, and Roman coin was flowing in India. The Greek and Roman writers, the epigraphic records in the Hindu Colonies abroad and at home; also the Sanskrit texts testify to the real situation. Hence it is futile to discover the nomadic form of tribal communism in these epochs reaching down to 300—400 A.D.

When the Feudal Age in India begins, we first find Yajnavalkya mentioning "common ownership" in grand-father's property. Dialectically it closes the first period of the evolution of Hindu Law. Manu Smriti in its present form, is certainly a later composition, but it is older than Yajnavalkya, and had its predecessors in Kautilya, the previous imperial Code, and in the post-Vedic Sutras. Hence the absolute right of the father in paternal property had been established before the days of Manu. There had been no question of common ownership in those days. Thus, there is this difference with European early laws. If from tribal-ownership in property to family-ownership had been the trend of European evolution, the Indian evolution as depicted in the Vedas, knows no nomadic stage; it begins with a settled society having individual right in property. Maine and others are mistaken in their discernment of the trend of Indian legal evolution. Those Occidental writers who had the notion that what happened in ancient Germany, happened in ancient India had erroneous information of Indology.

The written account of the ancient Germans was first noted down by Julius Cæsar during his invasion of Gaul. That was about fifty years before the nativity of Jesus Christ. But the Indo-Aryans of the Vedas at the most conservative computation have preceded two millenniums before the time when Cæsar wrote his account of the Germans. Further, if the newly discovered Indus Valley civilization be regarded as separate from the Vedic civilization, then at least India has preceded four millenia in civilization from that of the Germans or any other European country. Hence, we cannot discover the stage sought by Maine and La Fargue in the Vedas or in subsequent periods. Manu speaking about the absolute right of the father in ancestral property,

represented the archaic legal system of the Indo-Aryans; and anybody who had any knowledge about the Sanskrit Smriti-texts could hardly place Yajnavalkya anterior to Manu.

On these accounts, the hypothesis of Maine that 'joint-ownership' as it is to be found in Yajnavalkya is the archaic form of Hindu Law and the village community system as the manifestation of this legal principle, is the most ancient form of village society in India, falls to the ground.

Thus by scanning the Sanskrit literature down to Manu's Institutes we have found that there had been no talk of 'joint-ownership' as described by Maine, or "common ownership' as stated in two of the Smritis. It comes first in the Feudal Era that begins in India about the time of Yajnavalkya and Vishnu Dharmasutras. The latter Smriti is a sectarian one. It belongs to the Vishnuvite sect which has been declared in Vadarayana's Brahamasutras as un-Vedic (a-vaidika) one. Kane says that Kumarila (cir. 700—800 A.D.) did not mention the Vishnu-dharmasutras among the sutras studied by particular schools.[226] Again, according to Kane and other investigators, this text is a recast edition to suit the Vishnuvite point of view and has got ample additions both in prose and verse. Kane[227] thinks that these additions were made not long before Visvarupa, the first annotator of Yajnavalkya, that is, not after 800—825 A.D. which is Visvarupa's date.

Thus on close scrutiny the divinely inspired sanctity and great antiquity of the Smriti-texts evaporate to historical and later periods of the Indo-Aryan history. The Vishnu-Smriti got its last recension when the foreign Muhammedans were hammering at the gates of western frontier of India. From all these scrutinies, we find how slender is the thread on which the theory of common-ownership lies! This theory has been foisted in a few of the Smritis in Feudal and late-Feudal periods of India's history. It got its last legal stamp from Vijnanesvara in his Mitakshara when some parts of the north and the west of India had been irretrievably lost to the Hindus, and Mahmud of Ghazni's repeated invasions had taken place in the north.

226-227. Kane. Vol. I. p. 69.

Finally with the historical data in our hands we cannot say that just before Yajnavalkya closed the days of nomadism of the Indo-Aryans; later the evolution of family-collectivism took its rise which is reflected in his famous legal dictum. If anybody argues that Yajnavalkya Smriti reflects the archaic legal conception of the Indo-Aryans as in the text itself (III. 110) the author calls himself to be the same person to whom was revealed the Aranyaka by the Sun, and the "Yogasastra" was composed by him, then the question arises which of the texts of these branches of learning was written by him? But it is a vague saying which attributes it to Yajnavalkya. But Manu is older by long shot than Yajnavalkya. The post-Vedic Yaska called the former as the "self-existent one". In the texts he is called as one of the patricians who was born out of the mind of Brahmâ, the creator (manasputra). His name is mentioned in the Rig-Veda as one of hymn-composers (IX. 101, 106). The Aranyakas are latter-day compositions than the Samhitas. The position of Yajnavalkya text as more archaic than Manu text does not hold water according to Higher Criticism. Vishnu text has plagiarized much from Yajnavalkya. Kane admits the close connection between the two. According to Jolly, it is a very late production as Kumarila ignored it. It has already been said before that the original text of Yajnavalkya has undergone much interpretation and many recensions. Vijnanesvara writes in the Mitakshara that at the beginning a certain pupil of Yajnavalkya abridged the Dharma-sutras in the form of a dialogue.[228] Basing on the facts alluded by Higher Criticism, he cannot be put on a higher pedestal to be more archaic than Manu. It is clear that the text was written in the Feudal period sometime before Visvarupa.

But what concerns us here is his famous dictum, "Bhurya..... samasamyam" (II. 122). From Visvarupa down to Jimutavahana it has not been challenged. We find the sense of this aphorism echoed in Vishnu Smriti. Indeed, it is clear that the theory of common ownership is only to be found in a few texts written in the Feudal Era. It may be possible that this theory

228. Kane. vol. I. p. 169.

was first penned in Yajnavalkya, and then through the force of cultural diffusion was copied by others.

But a concept cannot rise without a percept. Yajnavalkya did not simply write it down for the fun of it. There must have been certainly some objective condition which gave rise to this theory. Jimutavahana's attempt to explain it as a precaution to ensure the fatherless grandson's share in his grand-father's property lest the surviving paternal uncles and their sons claim it, may not be the proper answer *a propos* the dialectics of the time of Yajnavalkya. There must have been a historical event of the period which has left its impress on the legal conception of Yajnavalkya. That historical event we are looking for.

The Smritis do not help us in this matter. We will have to refer to the history in our search for the objective we are out for. History tells us, that after the break up of the Maurya Empire there have been invasions of the Central Asian hordes into India. The Scythians at one time had lorded over Aryavarta (Northern India). The impress of the contact of the Scythians with Indian civilization is not yet properly evaluated by the Indian historians. There are enough evidences to show that having settled themseles in the north as Buddhists and in the Central India and elsewhere as othodox Brahminists, they left their marks in Hindu society and civilization.[229] The Scythians mixed with the Parthians (Pahlavas) had settled in the North, in Central India, in South Sind and elsewhere. Their coins have been discovered as far east as Bihar. The Kuisan emperor's dominions extended once to greater part of Aryavarta. The Huns settled in the North and in Central India. They in these places established their rules for centuries. It is likely that they have given rise to various neo-Kshatriya tribes of modern India. Perhaps the Sun-worship is taken from the Scythians termed in India as the *Sakas*. Bhavisya Purana claims it to be imported from Bahlika (Balkh). Again, to the historians it is clear that the Saka costume of trousers, *chapkan* and *choga* have been taken by the Indians from that time (vide the Sakastupa in Nagarjuna Konda in Guntur district; also the Scythian coin discovered in Bihar). The name of the

229. Kane: Vol. I. p. 202.

Indian scribes as Kayasthas first occurs in Yajnavalkya. There is a tribe of Kayasthas called *Sakasena* (soldier of the Sakas) which suggest some connection with the Sakas. The Kui-san coin "Nanaka" (II. 240; Bengal ed. 244) occurred in Yajnavalkya. We have already seen evidences of their intermarrying with Brahmnan and Kshatriya royal families in the literatures and epigraphic records. There cannot be any wonder that when they settled down in India as ruling classes, they have left impress of their customs which have reflected in some of the Smritis written in the same epoch. We have already referred to the view of Jayaswal that Yajnavalkya-Smriti was written when the Scythians were ruling in North India. Again, there is no proof that all of them were nomads in that time. They had developed royalty and some of them had settled life in Central Asia.[230] Moreover, the example of this legal concept in the old Chinese family as referred to above and the trace of it among the Tajiks —an Indo-European-speaking people of Central Asia—show that such a law might have been existing with the Central Asian tribes when they came down to India.[231]

If the legal concept of common ownership had been an indigenous development arising out of archaic Indo-Aryan law, in that case all the Smritis must have referred to it. Reliably we can mention of only two Smritis written in the Feudal Age and in some of the commentaries written on the eve of the Moslem invasion. But Narada and other Smritis of the same epoch did not mention of it though they speak of *Dandа*. The very texts of Narada, Smriti Samgraha and of Dhareswar give the lie that common ownership was the natural evolution of the Indo-Aryan legal concepts. Jimutavahana had predecessors before him.

As regards Narada, Kane says that this text is probably older than Yajnavalkya. Again, Kane admits that it is a more advanced

230. Vide Otto Francke: "Beitraege Zur Kenntuis der Turkvolker und Skythen Zentral Asiens." 1904.

231. The "Toxri" mentioned in the Puranas as Tukharas or Tusharas, the people of Saka-dwipa and the people of Kusadwipa (country of Kusi or Kusu) were described as settled peoples in the Puranas. (Vide B. N. Datta: "The Ethnology of Central Asia in "Man in India"). The ruling class was called Risika—the Arsi of the philologists. Excepting the Huns, they were Aryan-speaking peoples.

text than Yajnavalkya.[232] According to Jayaswal, Narada flourished in the fourth century A.D. under the imperial Guptas.[233] Mayne and Iyengar say that probably he belonged to the fourth century during the Gupta period.[234] Again, Narada boldly says that when there is a conflict between the Dharamasastras and usages, the latter have to be followed as they are directly observed.[235] If the theory of common ownership in grand-father's property had been the usage of the time, it must have been reflected in the Narada-Smriti. But there is no word about it there. On the contrary, he "declares the father's absolute right to distribute the property among his sons as he emphasised."[236] Again, Kane admits that Narada is regarded as an authoritative Smriti by Visvarupa, Medatithi and other later writers, and Asahaya wrote a commentary on it. According to J. C. Ghosh, Asahaya was a Bengalee and a courtier of emperor Dharmapala. On this account the Smriti of Narada must be older by some centuries than the eighth, the date of Asahaya.[237]

It is a strange thing that Narada did not have this legal concept nor it is to found in the epics. Thus, considering all these data in hand, we are led to conclude that the doctrine of "common ownership" comes from an exotic influence. Certainly, it is *non-Indo-Aryan.* It bears a non-Indian impress. It will sound heterodoxy to the sanatanists who believe that anything written in Sanskrit is 'revealed' or semi-divine hence infallible. The trouble with the orthodox section of the Hindu people is that they try to explain every Indian phenomenon as autochthonous. They have no idea that culture spreads through diffusion, that imitation, adaptation and invention are the processes through which civilization passes through. Again, the juristic writer Dr. Nares Chandra Sen Gupta says, "The history of the development of Hindu Law is to a large-extent a history of this mutual

232. Kane: Vol. I. p. 202.
233. K. P. Jayaswal: C. W. Notes. Vol. 17 p. CCLXXXV.
234 Mayne of Iyengar: p. 31.
235. Vide Kane: Vol. I. p. 203; 203-204.
236. Mayne & Iyengar p. 31.
237. J. C. Ghosh: "A Textbook of Hindu Law". Vol. III.

interaction of these two bodies of laws existing in India to count the influence exerted by large bodies of foreign customs which must have been imported along with the successive raids of the Greeks, Sakas, Huns and the various Mongolian tribes in ancient times. The impact of Indian civilization with that of the Assyrians, the Persians and even the Arabs must also be counted. It is only when we have taken account of all these that we may get an insight into the inner history of Hindu Law."[238]

(ii) The classical peoples of Europe.

We do not know much about the prehistoric wandering stages of the Indo-European-speaking peoples, called the Greeks and the Romans of European antiquity. From the gleanings in their legends we find that there were tribal chiefs or kings of their tribes. The kings got their sceptres and sanctions to judge on the activities of their peoples and to administer them from their supreme god Zeus.[1]

The society of Greece of legendary period includes the king and freemen engaged in different occupations. Again, we hear of the estates of land-owners. The historian Grote says, "The estates of the owners were tilled and their cattle tended, mostly by bought slaves, but to a certain degree also by poor free men called *Thetes,* working for hire and for stated period."[2]

Thus the history of legendary Greece does not bear any witness to any sort of communal property in land.

Again, we find the Hellenic people of Greece and the Latin people of Rome had traces of antique institution called *genos* in Athens and *gens* in Rome. These are similar to the *gotra* system of the Indo-Aryans. Thus these gentes were the ancestors of the families that bore their names. Again these families had peculiar ceremonies and celebrations of their own.[3] They resem-

238. N. C. Sen Gupta: "Sources of Law and Society in Ancient India."
1. George Grote: "A history of Greece". Vol. II, pt. I, Ch. XX, p. 15.
2. " " op. cit. pp. 37-38.
3. Hesoid: Opera. 753. Cicero: De Legib, II, II.

ble the various *kulacharas* of the Indo-Aryans which still persist. Further, the religious rituals of the family were transmitted from generation to generation as tradition. These gentes, again, were the components of the society. The members of these gentes were all agnates by relation.

As regards the proprietorship of land, unlike the primitive German who was the proprietor of the harvest only but had no right on land, the investigator tells us: "We do not find an age when the soil was common among them; nor do we find anything that resembles the annual allotment of land which was in vogue among the Germans."[4] In the matter of proprietorship of land, the same investigator says, "while the races that do not accord to the individual a property to the soil, allow him at least a right to the fruits of his labour—that is to say, to his harvest,—precisely the contrary custom prevailed among the Greeks. In many cities the citizens were required to store their crops in common, or at least the greater part, and to consume them in common. The individual, therefore, was not the master of the corn which he had gathered; but at the same time, by a singular contradiction, he had an absolute property in the soil. To him the land was more than the harvest."[5]

Again, the same investigator says: "The idea of private property existed in the religion itself. Every family had its hearth and its ancestors. These gods would be adored only by this family, and protected it alone. They were its property."[6] Further he says, "A result of these old religious rules was, that a community of property was never established among the ancients. A phalanstery was never known among them.... Every family, having its gods and its worship, was required to have its particular place on the soil, its isolated domicile, its property."[7]

As regards Rome, nothing was clear before the enunciation of the laws of the *Twelve Tables*. It is regarded as certain that at the time of the promulgation of this law, the sale of property was permitted. But de Coulanges thinks, that "there are reasons for thinking that, in the earlier days of Rome, and in Italy before the

4-7. F. de Coulanges: "Ancient city" pp. 77, 78, 80-81.

existence of Rome, land was inalienable, as in Greece."[8] Further he says, "The law of the Twelve Tables, though attaching to the tomb the character of inalienability, has freed that soil from it."[9] Again, "the appropriation of land for public utility was unknown among the ancients."[10] Finally the investigator says, "so inviolable above all else is the right of property."[11]

(iii) The Trans-Himalayan peoples.

Now let us turn to North-East Asia, i.e., China, to find out the land relationship in ancient time in that region. The recent investigations in Chinese history inform us that about 4000 B.C., the trace of a Mongolian people with Neolithic culture is to be found in North China. Instead of being hunters, we find them as cattle-breeders, "who are to some extent agriculturists as well."[12] Further they say, "It has been shown that there was no trace of any high civilization in the third millenium B.C., and indeed, that we can only speak of a real Chinese civilization from 1000 B.C., onward."[13] It was during the rule of Chou dynasty (C. 1050—247 B.C.), that the country was developed into a feudal state. The conquerors were in minority and aliens to the people and called themselves the hundred families.[14] The conquerors introduced rigid patriarchal system of family life.

During the period at about the first century B.C. Buddhism was introduced into China. It found acceptance among the middle and lower classes to whom this religion through the doctrine of an after-life, brought a ray of hope in their life. The interesting thing is that the merchants used the Buddhist monasteries as banks, stock exchanges and ware-houses. Thus, the mercantile community was well-disposed towards Buddhism and gave money and land to the temples. The temple authorities settled the poorer

8-9. Ibid. Ditto p. 91.
10-11. Ibid. Ditto p. 92.
12-13. Wolfran Eberhard: "A History of China" 1950 pp. 6, 4.
14-15. Ibid. Ditto. pp. 26-27; 144.

peasants on this land. This gave further incentive to the propagation of Buddhism.[15] It is not necessary to trace the economic development of China any further. We find that in the course of its evolution, China had developed feudalism, big landlord classes and peasantry. Thus the existence of private property and its corollaries are assured to us. But one thing that interests us here is the composition of Chinese family life. In this matter we quote a Chinese scholar who defines a Chinese family thus: "Theoretically it may be defined as a group of kinsfolk consisting of parents and their children living together in a single domestic establishment."[16] As regards marriage the learned scholar says, "Marriage between all degrees of blood-relationship through males is prohibited."[17] This is analogous to the prohibition of *sogotra* marriage with the Hindus till yesterday. But, "marriage is permitted, however between maternal blood-relations, even as close as first cousins, provided the bride and the bride-groom are of the same generation. Persons of the same surname descended through males from a common ancestor, no matter how remote, cannot intermarry. This prohibition also includes persons of different surnames, but descended from the same ancestor."[18] Thus, it is clear that agnatic intermarriage is not allowed in China.

As regards family property, the author says, "Since the property of the family is held *in common* and as far as possible *undivided,* only the exceptionally energetic and ambitious trouble themselves to undertake new enterprises..... Furthermore, the average person in a large family hardly dares to run the risk of undertaking a great enterprise, though his gain benefits *all,* his loss likewise brings misfortune to the whole family".[19] The first part of it is again analogous to the Hindu law of Joint-family.

Finally, the author says: "The family property, the means of existence has always been collective".[20] Thus, so far the basis of Chinese family life is economic collectivism of property. But

16-17. Sing Ging Su: "The Chinese Family System: 1922 pp. 48, 60-61.
18-20. Ibid: Op. cit. pp. 60-61; 93-94.

the land reforms inaugurated by the Chinese People's Republic is breaking up the collective ownership of family land.[20A]

Next we find that another Trans-Himalayan people mentioned in the old Chinese annals as *T'a-küe* and now-a-days called Turks had a custom which lends additional proof to our enquiry about the source of family collectivism in landed property. Enquiring about the Greeks and the Scythians, the investigator Mr. Minns[21] quotes facts about the customs of the nomads from Chinese sources. Thus he says, "The Eastern tribes were more democratic than the Westerners.....they disposed of their dead on platforms instead of burying them".[22] This is analogous to the one of the customs of the disposal of the deadbody called *udhita* i.e. putting the corpse on a raised platform or on a tree-top.[23] (RV. VIII. 51. 2; AV. XVIII. 234).

Then the investigator says, "Although the T'a-küe change place, yet they have special land for each family, agriculture is not unknown to them".[24] Thus like the ancient Germans, inspite of their roving about, each family had a special allotment of land. Hence, family collectivism in land is to be discerned here.

Then we come to enquire about another people the *Tadjiks* who live across the Himalayas. A European lady named F. W. Halle while enquiring about the women of Asian part of Soviet Russia says: "Among the Mountain Tajiks of the Pamir the women move about freely, and not only do the men discuss all questions with them, but their voice has weight within the social unit to which they belong.....whereas property is in common amongst the men, the women own private property (cattle, etc.), and the men are not admitted at all to the border".[25]

The investigator while trying to trace the echoes of matriarchy among the eastern women of Soviet Russia, has found out that contrary to the law of Shariyat, the men hold the family property in common. It echoes the dictum of Yajnavalkya that

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20A. See the references about it in the novel of Ting Ling: The Sun shines over the Sangkan river: Peking. 1954.
21-22. E. H. Minns: "Scythians and Greeks" pp. 95-98.
23. Vide references in "Vedic Index" by Keith and Macdonell.
24. E. H. Minns: "Scythians and Greeks", pp. 95-98.
25. F. W. Halle: "Women in the Soviet East." Translated by N. M. Green. 1938, p. 55.

land, corody and chattels are common to the men of the family! Here, again, we find that the Muhammedans do not compulsorily observe Islamic laws everywhere.

The Tajiks of the Pamir are an Iranian-speaking people being cognates with the ancient Scythians (Sakas) who were also an Iranian-speaking people of Central Asia. The Tajiks of the Pamir have been late converts to Islam and have retained the traces of some old Zoroastrian customs as observed by Ujfalvy. But recently, the Bolshevist influence is weaning them away from such ancient customs.[26]

Thus inspite of the inroads of Islam in the mediaeval period and Bolshevism in the present day, these Indo-European-speaking people have still retained the Central Asiatic custom holding property in common by the male members of the family.

26. Vide Kunitz: "Red Star over Samarcand."

IV

A CONTRAST OF THE TWO SCHOOLS OF LAW

Our angle of vision in studying the subject may appear as new to the orthodox mind. But it cannot be gainsaid that the impacts of foreign infiltrations are attested by the Puranas themselves. The Scytho-Parthians, the Gardavillas, the Kilkila Javanas and such others settling in Central India were at last absorbed in the Indian population.[1] The epigraphic records that are being discovered are testifying to the truth of the facts mentioned in the Puranas.[2] Surely they have left their marks in the Indian society, its customs and laws.

The impact of foreign influence on the Indian culture from the ancient days is not yet fully investigated. We are not yet cognizant of the facts that foreign words and impress are to be found in the Rig-Veda itself.[3] We are oblivious of the facts that foreigners like the Jews and the Arabs were trading from the period anterior to Manu and Yajnavalkya even.[4] We have not yet realized that Arabic words have crept in Hindu Astronomy and in common parlance. Even Persian and Arabic words have crept in quasi-revealed Smriti Thus when Jaimini in his *Purva-Mimamsa* discussed about words "revealed", he eschewed some words as of *mlechha* origin. One of them is *pil*. It is an Arabic word meaning elephant. This word has been sanskritized and we find them mentioned in the Pala inscriptions of Bengal as "Mahapilupati" (the commander of the elephant forces). We are not yet completely conscious that lots of Hellenic words were engrafted in the Sanskrit vocabulary long

1. Foreign travellers testify to the presence of blue-eyed persons even among the so-called autochthones of the region.
2. Dr. Hazra: "Puranic Records".
3. Vide Sylvain Levy "Pre-Aryans and Pre-Dravidians in the Vedas"; B. N. Datta "Dialecties on Hindu Ritualism." Pt. I.
4. "Three Shemitic Inscriptions from Bhuj": Ep. Ind. Vol. XIX.

ago.[5] Here Babylonian connection which is of still earlier period is not taken into account. Hence, there is nothing to get shocked at this. The Hindu culture has always been pliant and assimilative. The strange thing is that our savants have interpreted Hindu religion and history from the standpoint of the foreign Orientalists. Yet we are not shocked at it. Our so-called jurists have written ponderous law-texts interpreting Hindu Law according to the views of Morgan and Maine and we take them as orthodox views.

Thus, unless proper data as to the autochthonous evolution of Yajnavalkya's theory of common ownership is produced, we will hold it as an exotic engraftation which later on acculturated itself in Indian culture. There cannot be any talk of simultaneous evolution of two forms of legal systems. Indo-Aryan culture is one. Wherever the Indo-Aryan culture has gone, it has implanted Manu's law, as for example, in Ceylon (at present not discernible on account of mixture of different cultures), Burma, Siam, Cambodia, Bali, in the past in Hindu Java. Also, in the Phillipine islands Hindu law was in vogne before the Spanish conquest. Yajnavalkya's law has nowhere been introduced in the Hindu colonies.

Thus so far with Yajnavalkya. Now we come to his famous commentator Vijnanesvara who wrote the Mitakshara. It is said that as Mitakshara is universal everywhere in India except Bengal and Assam where it is important after Dayabhaga, it testifies according to some, that family collectivism has been prevalent all over the country except Bengal where it was broken up through the impact of Muhammedan influence. The usage of family communism impelled to develop the law of common ownership as embodied in Mitakshara. But we have already seen that the history and testimonies of Indian culture give the lie to this supposition. The Indo-Aryan society has never passed from tribal communist stage to family communist stage. Neither is it a fact that Yajnavalkya had been the universal code at one time. Jayaswal's supposition that it was probably the imperial

5. Gouranga Banerjee: "Hellenism in India."

code of the Guptas, is without any foundation. Yajnavalkya probably became popular as a text on account of its systematic arrangement of the topics into different chapters and lucid reading.

As regards this text some think that it was written for the Satavahanas, and propagated by them during their conquest in the north. While another writer thinks that it was done by the Chalukyas and spread outside with their conquest.[6] Moreover, we have already seen that there is much in common with it and the texts of Kautilya and Manu. For all these, it is taken as an orthodox *Smriti*.

As regards Mitakshara, historically we find that it was written at the Court of a Rajput King at the time when the Arabs and the Turks were in possession of some parts of the western and northern India. It was during the Muhammedan period that it became an authoritative text in the greater part of India except in Bengal where another system was already in vogue. But strangely, it is not prevalent *in toto* in the other parts of India, where each province has made its own modifications. On this account, Colebrooke has described that Mitakshara has got *four* schools. But these schools have other texts to guide them, though Mitakshara is the common text amongst them.

WHERE MITAKSHARA PREVAILS.

West and Majid[7] in their law-text describing the extent of the prevalence of the Mitakshara school, say: "In the Mahratta country and in the Northern Kanara, the doctrines of the Mitakshara are paramount. (I. School). In Bombay Island, the question of inheritance is subject to any varying doctrine contained in the Vyavahara Mayukha. The law of Guzerat places the Vyavahara Mayukha before the Mitakshara. In the Banaras Province, Viramitrodaya (III. School) is prevalent, though it adheres more closely to Mitakshara, yet as has been said before it makes a compromise with Dayabhaga in the matter of *Pinda*

6. J. C. Ghosh: Vol. II. p. V.
7. West and Abdul Majid (West and Buehler): "A Digest of the Hindu Law of Inheritance". 1919.

theory. In South India in the 'Dravida School' (II. School) along with Mitakshara, the 'Madhaviya' of Vidyaranya is prevalent. In the Andhra Country, the 'Sarasvativilasa' written by Pratap Rudra of Warangal[8] in the fourteenth century is prevalent. The custom and the land tenures in the Andhra Country are based on it. In Mithila (IV. School) along with Mitakshara, 'Vivada-Ratnakara' and other texts are the highest authority." Mayne says, "In Mithila or Tirhoot, the authority of the Mitakshara prevails except in a few matters in respect of which the law of Mithila School has departed from the Mitakshara".[9] On the other hand, the Kapur Khetris of the Punjab are governed by custom and not by Mitakshara.[10] Again, formerly some of the Muhammedan sects, viz., the Ishmaelites, the Cutehi Maimons, the Khojas, the Borahs, the Malesalem Girasias of Broach have upheld the Hindu law of succession until recently modified. So long they have been governed by the Hindu law of the place in respect of inheritance only, and their daughters have no shares when there are sons. 10751

Again, Apararka's text is of paramount authority in Kashmere. Then the question naturally arises, how is it that Mitakshara came to be the universal text in India. At first, it is a most lucid annotation of Yajnavalkya that supposed to have harmonized all conflicting dicta of the smritis. Here it must be said that Vijnanesvara did not implicitly follow Yajnavalkya. He had his own opinions in many matters. In fact it is a separate book. It seems that Manu is too hard for comprehension by the interested Pandits, but Yajnavalkya is a better handbook to understand. Moreover, Mitakshara is a lucid interpretation of Yajnavalkya. Hence the priestly brain-trust during the Muhammedan period probably took fancy to it. The text of Dayabhaga is regarded as a later publication .The priestly brain-trust advised the rulers of the newly-formed kingdoms to adopt Mitakshara as modified by them, as the guide-book of the States. Hence, arose the bizarre varieties of legal rules in Hindu Law.

8. Some say he was of Orissa.
9. Mayne and Iyengar p. 53.
10. Vide Mus. Rukmini vs. Sain Das, 32 I.C. 75, 19 Panjab W.R. 1916.

Then came the rule of the English East India Company. In their enquiry about the law of the Hindus, they asked the Pandits of different provinces about it. The texts they handed over as authoritative were accepted by the British Indian Courts and the Judicial Committee of the Privy Council in England as the legal authorities in Indian Law. Again, the Privy Council by its various decisions has modified to a great deal both the texts that are extant to-day. Thus Mayne and Iyengar say: "At a time when the opinions of Pandits who were only conversant with a few text books in each province guided the decisions of Courts, it was natural to assume that the text books they most frequently referred to were the special authorities in particular province. With much wider knowledge and far greater attention to Sanskrit law-books, it is clear that the assumption then made is no longer correct".[11]

Thus, we have ample proof that Mitakshara is not binding on all Hindus living outside Bengal and Assam (V. School). Hence West and Majid say: "The Brahmanical law, Mr. Ellis points out (Steele—Hindu Law, 162) never obtained more than qualified domination in Southern India. In Bombay Presidency, the collections of Mr. Borradaile and Mr. Steele show that many caste usages have been preserved contrary to the rules of the Smritis, designed generally or chiefly for the guidance and control of the Brahmans. The tendency to adoption of the ceremonies and legal ideas of the higher castes by those of a lower order has already been noticed. But many differences still subsist which make it hazardous to apply the rules of the *Sastras* to the legal relations and transactions of any but the higher castes in the sphere of status and of family law, of adoption, and of inheritance".[12] Again, the same authorities say, that amongst the lower tribes of the Bombay Presidency, the tribal ownership of property is not to be found.[13] Further, they say: "Thus among 82 of 101 castes from whom informations were obtained by Mr. Steele at Poona (Steele. L.C. 216, 405, 407).....that in the usage

11. Mayne and Iyengar. p. 61.
12-14. West and Majid: pp. 516-517; 399; 691.

of a large minority, at least in the people of Deccan, the rule of Baudhayana is still received as law".[14]

Further, regarding the universality of the laws of Mitakshara and Mayukha, Justice Westtropp of the Bombay High Court has said, "It must, however, be recollected that high as undoubtedly is the authority of the Institutes of Manu, the Mitakshara, and the Mayukha, in this Presidency at large it cannot be affirmed that the *whole of any one* of these works is in full force in any part of this Presidency. They are all subject to the control of usage".[15] Again, a strange incidence brings out the discrepancy between the written law and custom. In the Madhya Pradesh governed by Banaras School of Law, the Judges of the Allahabad High Court have said: "We thus find that the disputed interpretation of the Vedic text has received the authority of the authors of Vira Mitrodaya, Smriti Chandrika, and others, and the principle of the general *exclusion of females* from inheritance has been affirmed by writers on Hindu Law and is admittedly accepted in Bengal and Madras, and we believe there can be no doubt that the customary law of this part of India excludes females not expressly named as heirs from inheritance, (5. All. 311);[16] while on the other hand, in the Bombay Presidency the doctrine of general exclusion of women from inheritance is not followed".[17] Thus there are discrepancies between laws as stated in the texts and in usage.

Finally as to the validity of the claim that the Hindu Law is based on custom, we will have to go to the Records of local and tribal customs compiled by the British-Indian Government or by other agencies. Thus Mayne and Iyengar say, "In some parts of Northern India, particularly now in the Panjab or places adjacent to the Panjab, the strict rules of the Mitakshara, as recognized by the School of Banaras have not been followed by some castes, tribes and families of the Hindus, and customs which are at variance with the law of Mitakshara, as recognized by that school, have been for a long time consistently followed

15. Lallubhai Bapu Bhai vs. Manku Varbai, I.L.R. 2 Bom. 418.
16. Gauri vs. Rukhar 3 All. 45.
17. Lallubhai vs. Cossibai 7. I.A. 212-231.

and acted upon, and when such customs are established, they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. Such customs relate to a variety of subjects, as for instance, to widows, adoptions, and the descent of lands and interests in lands; they are to be found principally amongst the agriculturist classes, but they are also to be found among classes which are not agricultural"[18] [Ramkishore vs. Jainarayan (1921) 48 I.A., 405, 410, 49 Cal., 120]. Further, S. Roy says: "In no country throughout British-India, is the reign of custom so paramount as in the Panjab. Here, in village communities, among Hindus and Muhammedans, agriculturists, and non-agriculturists, customs and usages regulate and determine the civil and municipal rights of the people much more than Statutes and Laws. Decisions by the highest court of the land abound in the recognition of such customs and usages. The Panjab civil code has fully recognized the legal force of custom in all matters of civil right and that it prevails against Hindu Law where the latter is shown to have been superseded by it".[19]

A thorough sociological investigation will bear out the same fact that there is a variance between pious injunctions of the smriti-legislations and the usages and customs of the common people.[20] (See the verict of Madras High Court on a certain form of customary marriage among the Reddiars of Tinnevally as incest. Hindusthan Standard dated 26.4.1956).

Thus even in the Panjab there are agricultural and non-agricultural classes who donot abide by Mitakshara. The very fact that in the Panjab which was so long believed to have been the cradle of the Vedic people, all castes donot abide by Mitakshara which propounds family collectivism, drives another nail to the old theory that Mitakshara is the legal code of the stage of family communism in the Indo-Aryan society.

18. Mayne and Iyengar: p. 69.
19. S. Roy: "Customs and Customary Law in British India": p. 462 1911; also Tupper: "Panjab Custom."
20. The same variance is to be observed in the province of Bihar where the Sudras have different customs from the Brahmanical injunctions.

From all these illustrations we deduce that the Mitakshara School of Law has been foisted on the Hindu during the turbulent days of Muhammedan supremacy in India. During those days, when Hindu Kingdoms were rising and falling, when new Hindu tribes were getting dominant at some localities, the priesthood not only fabricated respectable ancient geneologies for them, but also among other paraphernalia of royalty handed them over the Mitakshara text for guidance in legal matters. The history of the Nibandhas bear testimony to it.[21] On this account, it can safely be said that Hindu Law is based not on current customs of the people, but superimposed from above. It is a class-legislation, confined mostly amongst the upper classses. Of course, like elsewhere in the world, the more the lower orders are getting elevated economically and culturally, the more they are copying the habits and customs of the upper orders. This is all the time happening in India.

Similar is the case of marriage and widow-remarriage. The lower orders everywhere donot follow the rules of the Smritis, their marriage ceremony is not performed according to the system of the Smriti-rites. The investigations of Indian and foreign scholars, have disclosed customs of marriage unknown to the Smritis. The Sudras everywhere have customs which are not in consonance with the Smritis.

Again, widow-remarriage is allowed among the Sudras everywhere in India.[22] The book entitled "Panjab Customery Law" discloses many facts which will shock orthodoxy. Even in Bengal, the most Brahmanized and orthodox province, widow-remarriage is current among some of the castes labelled by the British-Indian Government as "Scheduled". It was current among the Vaishyas as late as fourteenth-fifteenth centuries as attested in the Bengalee literature.[23] The writer's investigation in this matter proves this: Those castes who are completely Brahmanized and claim higher status donot practise widow-remarriage.

12. Vide also Jolly: "Recht und Sitte".
22. It came out strongly in the Constituent Assembly in 1948 during the discussion on the subject.
23. Vide Narayanadeva's Padmâpurana. It used to be called "Sanga" a term which is to be traced in early Buddhist *dohas*.

Even there is a distinction in this matter between Bengal and the other provinces. Bengal being the most Brahmanized province, only the so-called lowest castes (*anacharaniya*) and some sects practise it. Elsewhere, it prevails amongst the respectable castes.

The Smriti mandates are neither obligatory on them nor do they understand it. They follow caste customs. Even divorce and re-marriage are allowed in certain cases. Regarding re-marriage of widows, the jurist Ghose says, that it is prevalent among the great majority of the Hindu inhabitants of India, and the courts have recognized its validity.[24] Further, the same authority says: "The customs of divorce and remarriage among the lower classes are sometimes arbitrary and unreasonable that courts of civilized communities should never recognize them".[25]

From all these data we come to the conclusion that as Indo-Aryan religion is a superimposition of the dominant classes, likewise all other elements of the Indo-Aryan cultural institutions are imposed from the above. Hence, we find the class cleavage in culture, in religion and in custom. The Hindu Law is the law of the dominant classes. As a result there is a strong divergence in every part of India between the law-digests acknowledged by the authorities that be and the customs of the lower castes. The jurist Ghose is right when he says, "that Hindu Law is based on the Smritis and that it is an error to consider that commentators embodied the customary law of their respective provinces. The commentators expressly repudiated that position".[26]

Thus having seen that Yaj. text and its annotation Mitakshara donot represent the most ancient system of Indo-Aryan law, that both are secondary systems and as Mayr expresses it as newer law, we now turn to Jimutavahana's *Dayabhaga*. Recently Jimutavahana has emerged triumphantly out of the slanders of his own fellow-provincials that he wrote under the influence of a Moslem Court, that he was influenced by the Islamic Law, that he

24. Regarding forms of remarriage vide J. C. Ghose, Vol. I, pp. 811-816; Mayne and Iyengar pp. 186-187; also "Panjab Records", 1905.
25-26. J. C. Ghose: Op. cit. vol. I. pp. 821; Preface P. V,

was a very modern man, that he would have died an unnoticed man of a socially stigmatized Brahmanical sept of Bengal[27] but for the grace of the British-Indian Government who were duped by some of the Pandits of Navadwipa who handed over his text as the authoritative Hindu Law-text of Bengal, etc.[28] But with the publication of Sri Kane's encyclopaedic Dharmasastras, the proper dates and preceding authors before Jimutavahana have been found out. Again, with the help of these discoveries, S. Iyengar has corrected somewhat the former mistakes that prevailed about Jimutavahana, in Mayne's new edition of his text-book of 1938. Now, both the authors are agreed that both the schools of Hindu Law are indigenous and of decent antiquity. Of course they have not traced the reason of the divergence, and are content by saying that Vijnanesvara himself has admitted that there are two schools: Northern and Southern. In a word, it is now generally understood that Mitakshara is based on Yagnavalkya and Dayabhaga is based on Manu.

But these latest sayings donot solve our problem. The question that still remains unanswered is: how is it that Bengal accepted Dayabhaga and not Mitakshara. In order to unravel the mystery somewhat, we should go back to the earliest history of Bengal. We know that Bengal had been under every empire that rose in the Gangetic valley. But after the breakup of the Gupta empire Bengal began to assert her independent political entity. Later on, at the time which synchronized with the rise of the Pala dynasty of Bengal and the establishment of its rule in

27. Ghose says that Jimutavahana's sept of Paribhadra exists in to-day's Pâri or Pârihal Gai of Brahmans. A Brahman Pandit of West Bengal informed the writer, that men of *Pârihal* (not pâri) *Gai* inhabit the western part of the districts of Burdwan and in Bankura. Most of them live in Manbhum district now a part of Behar. They work as menials in the house of the Brahmans; also they are engaged in the occupations of wood-chopping and cultivation. Thus they are a proletarianized class. Hence, they stand socially lower than the other Rahri septs. But there is no proof that Jimutavahana sprung from this class. "Pari-gai" is of good standing in geneological books.

28. The informant of this Navadwipa gossip to J. C. Ghose was a very famous learned Pandit of his time Vide pp. VIII, X, whose learning made him declare that the Ismaelic forgery of *Allopanishad* is an upanishad attached to Atharva-Veda.

Eastern India, we find *Srikara* enunciating the *pinda* theory in the matter of succession. Thus he built his theory on Baudhayana and Manu. Kane says that "most of the views attributed to Srikara were also entertained by Visvarupa or are more antiquated than Visvarupa's".[30] The author of Smriti-chandrika like some others, compiled digests of Smritis and added his own explanation of them (Smritichandrika-vyavahara sec. p. 266). Again, we find him explaining passages of Yag. as they are cited in the Mitakshara and Dayabhaga. The remarkable view of Srikara is that on *Rajaniti* (politics), he expressed the view that the poor and the helpless are entitled to a share of the royal wealth.[31] As Srikara wrote a digest of Smritis and advanced the doctrine of "spiritual benefit", it does not seem that the law of Yag. was in vogue in the Pala empire at that time. At this time lived *Asahaya* about 810 A.D.[32] who was probably a courtier of the Buddhist emperor Dharmapala, but according to Kane, his date was 750 A.D. He wrote a commentary on Narada Smriti. His Smriti is not yet found out, but he is living in quotation. The writing of his commentary gives us the hint that Manu-Narada School was in vogue in the East at that time.

Then comes Jitendriya of Bengal about whom we have spoken above. He expounded the theory of the widow's right to her deceased husband's property (Dayabhaga p. 256). Then comes *Balaka*, another writer from Bengal who advocated the right of succession to a daughter's son. This is absolutely in consonance with Manu. Then comes Balarupa whose identity with the former writer is a doubtful one. He drew the cognates in the line of succession.

Thus from Srikara onwards we find the Eastern Jurists are more leaning on Manu than to Yaj. Then came a great change in the East. With the downfall of the Pala power, and with the establishment of orthodox Brahmanical ruling dynasties in

29. The inscriptions of the Gurjara-Pratiharas and their sattelites from Western India, called emperer Dharmapala 'Gaudendra Bangapati'. Vide Sagartal insc. in Arch Survey of India. 1903-4; also Baroda-plates of Kakarigya Ind. Ant. vol. 12, p. 16.

30-31. Kane: Vol. I. P. 267.

32. J. C. Ghose: Vol. II.

different parts of Bengal, viz., the Varmans of East Bengal, the Suras of West Bengal and finally the Senas all over Bengal, Kamarupa and Mithila, a great political and social revolution took place. During this period and in the period of the Turkish conquerors, Buddhist culture was completely uprooted from Bengal. Buddhist tradition was made to be forgotten by the people. The Pala achievement and the past culture of Bengal were thrown into oblivion. To-day, the past history of Bengal is the subject of investigation of the archaeologists and historians.[33]

In this period, neo-Brahmanism and a new social order began to be introduced in Bengal.[34] In this age, Bhavadevabhatta introduced new rules about Brahmanical rites and ceremonies which are still in force in Bengal. In the Belava plate inscription[35] of Bhojavarman, we read of a Brahman of Savarna Gotra hailing from the Madhyadesa, became the recipient of a gift of land from the King. Probably Bhavadeva sprung from that family. Again, in the Bhubanesvara inscription of Bhatta-Bhavadeva, the date of which is put between circa. 1025-1150 A.D. we find the following: "He (Bhavadeva) is Agastya to the sea of the Bauddhas (Buddhists). He is a minister to Harivarmanadeva. He is prominent among the exponents of Brahmâdvaita system of philosophy and is conversant with the writings of Bhatta (i.e., Kumarila); he is an antagonist of the Buddhists and refuted the opinion of heretic dialecticians (V. 20). He is proficient in Siddhanta, Tantra and Ganita, and has special keenness for astrological sciences (Phalasamhitas). He himself composed a book on Horoscopy (Horasastra). He wrote a treatise on Smriti as well and superseded the texts that were already in the field (V. 22). Following Bhatta he also has written a guide to Mimamsa Philosophy. He is well versed in other subjects also, such as, Arthasastra, Ayurveda, Astraveda

33. The Pala ballads survive among the Muhammedan singers of North Bengal, and in Maurbhanja in Orissa!
34. The origin of the castes and social hierarchy of Bengal as given in Brahma-vaivarta Purana and Vrihaddharma Purana do not agree with that given in Vallala-charita which is more in consonance with the present order.
35. N. G. Mazumdar: "Inscriptions of Bengal". Vol. III.

and so forth (V. 23)". Thus we find this powerful minister of a king of orthodox persuasion superseding the other Smritis that were in the field. But it is said that he has not mentioned anything about Vyavahara in his Smriti.

Then, we refer to the still later-day inscription discovered at Deopara[36] of Vijayasena, the first of the Sena royal family. This epigraphic record says, that the king, in his last days frequented the sacred hermitages situated in forests on the banks of the Ganges, which were full of renowned ascetics fighting against the terror of rebirth. These (hermitages) were fragrant with the smoke of sacrificial butter. Here, the young deer rejoiced in the milk of the breasts of kind-hearted hermit-wives and the multitude of parrots were familiar with the entire text of the Vedas (V. 9).....Through his grace the Brahmans versed in the Vedas have become the possessors of so much wealth that their wives have to be trained by the wives of the towns people (to recognize) pearls, pieces of emerald, silver coins, jewels from their similarity respectively with the seeds of cotton, leaves of *saka*, the developed seeds of pomegranates (V. 23)".

Again, the inscription of the other Sena Kings record the Yajnas of various sorts and gifts of villages to the sacrificing Brahmans. Further, the Madhainagar copperplate of Laksmanasena is of great importance. In it he claims that his ancestor Samantasena was a Karnata-Kshatriya and he himself a Brahma-Kshatriya. Again, his mother was a Chalukya princess of Deccan.[37]

Thus an extremely ideational and Brahmanical environment was created by the orthodox Kings and the Brahmans who came from outside Bengal. A distinct swing was made towards Vedic study and its guide the Mimamsa philosophy. A political and social atmosphere was created in which there was no room for latter-day Smritis and the still latter-day annotations. The ruling class wanted to go back to the pristine days of the Vedas. The Deopara-inscription shows what an idyllic situation was being conceived outbidding the Brahmanical propaganda of Kalidasa and Bhavabhuti. Thus sacking the Buddhists and the heterodox sects and wanting to go back to the ancient days, the propagan-

36-37. Ibid. op. cit.

dists of Neo-Brahmanism with their strong notions of *achara* were laying the foundation of modern Hindu society of Bengal.

In this atmosphere, Jimutavahana's *Dayabhaga* was conceived. He embodied the legal doctrines of his predecessors that were current in the country. He would not base his doctrines either on mediaeval Yaj. nor on its modern annotation Mitakshara.

Again, in the age that began with the establishment of Sena rule, there were a series of writers of Dharma-texts who discussed about purificatory rites and ceremonies of Brahmanism. In this series we find Aniruddha, the author of *Hâralata* in which he said that he consulted the commentaries of Manu and other Smrities. Again, the great King Vallalasena himself wrote *Dânasâgara* and *Adbhutsâgara*. Then comes Lakshmanasena, who was not only himself a Sanskrit scholar, but also induced the Pandits of his Court to write religious texts to wean away his subjects from Buddhism and its offshoot Tantricism. The most famous of them was Halayudha, who was a Judge in the administration under the Senas. He wrote several "sarvasvas" of which the most well known is Brâhmana-Sarvasva. Again, his brother Pasupati, wrote *Matsya-sukta* under the instruction of the king to wean away the people from the evil practices of the Tantrikas. He also wrote *Srâddha-Krytya-Paddhati* and *Kayajna-Paddhati*. His brother Isana, wrote *Dwijâhnika-Paddhati*. Further, in this Court, Jayadeva composed the famous Vishnuvite lyric text called *Gitagovindam*.

Again, Sridharadasa, a contemporary of Laksmanasena, wrote his *Saduktikarnamrita*. All these writers had flourished circa the middle of twelfth century A.D.

There is no proof that Halayudha, the Judge of the Court of Lakshmanasena, wrote any text on Vyavahara which was the law of Bengal at one time. Kane says that there had been several eminent writers of the name of Halâyudha in the period on the eve of the Turkish invasion. There was another Halâyudha who was a Jurist and quoted by others. Kane says that he held opinions similar to those of Dharesvara, and Jitendriya. The sense of these quotations that have survived agree with the doctrines of Jimutavahana. Therefore he flourished between

1000-1100 A.D.[38] But Jimutavahana while he quoted Jitendriya did not mention this Jurist. According to Kane, he was probably a Maithili or a Bengalee writer, because the writers of these two places took him as a great authority. Does the silence of Jimutavahana regarding the Jurist Halayudha throw any light regarding his date? Those who say that as Kulluka and other religious text-writers did not mention him, hence he must be of later date, must pause at this query. Hemadri who lived in the fourteenth century, did not mention Mitakshara text though both the author hailed from the same province. Again, Jimutavahana did not cite Vijnanesvara's name or his work. All these omissions on the part of Jimutavahana will entitle him to be anterior to eleventh century or still earlier. Ye, we are in the dark regarding the exact date of the author of Dayabhaga. Lately, Sri Panchanan Ghose has fixed his date from the *Kala Viveka* written by Jimutavahana which mentions a solar eclipse which occurred in 1014 Saka Era (=1092 A.D.). In conclusion Sri P. Ghose says, "All point to the same conclusion: namely, that Jimutavahana flourished during the latter part of the eleventh century when King Vijaya Sena was reigning in Bengal. Colebrook himself also apprehended that the founder of the Bengal School might be a contemporary of Vijnanesvara".[39]

But from what has come to light in the matter of law in early Bengal since the Pala rule, we can safely say that all the doctrines enunciated in Dayabhaga, had been current in Bengal long before the birth of Jimutavahana. In Eastern India the enlightened men were veering towards Manu. That is manifest since Srikara. Then in the period of Brahmanical revival, the learned men were studying the Mimamsa philosophy and its annotations by Kumarila. There was a great revival of Vedic learning. As early as 500 A.D. we read from the Buddhist history[40] that Chandragomin, a learned Brahman of Varendra, was versed in

38. Kane: Vol. I. p. 297.
39. P. Ghose: The Calcutta Law Journal. Vol. 26. 1917. "Jimutavahana".
40. Vide Lama Taranatha: "Geschichte des Buddhismus in Indien" (translated by Schiefner). Chandragomin wrote a grammar of Sanskrit language. The district of Chandradwipa (modern Backerganj) was named after him.

the Vedas and the Brahmanical learning, though he turned a Buddhist in later life. Thus those who introduced neo-Brahmanism in Bengal, were getting their inspiration from the fountain source. They did not stick to mediaeval Yaj. and Vishnu. They looked up to the Vedas and Manu.

All these facts lead us to accept that Yaj. was never current as the law-text in Bengal. There is not a shred of a proof about it. As for Mitakshara, it is out of the question. It is absurd to think that Mitakshara became the law of Bengal when it was written in the South only in the eleventh century. Those who adhere to Mitakshara in present-day Bengal are the descendants of newcomers from the upper gangetic valley in modern period. They are the Khetris, Kanyakubja and Jhajotiya Brahmans and others. Yet, some of them have accepted Dayabhaga, as the Rajputs who had been settled in the district of Bankura by the feudal Bhuiya Rajahs of the defunct Vishnupur Raj, have adopted Dayabhaga as their law and belong to the Gaudiya sect of Vaishnavism.[41] Similarly, the Rajput caste of East Bengal with the surname of "Varman" is governed by the Bengal School of Hindu law. But the latest enactment of the Government of British period, made it difficult to change one's hereditary law.

The presence of families governed by Mitakshara law in Bengal is no proof that Mitakshara had once prevailed in Bengal. Those who are ignorant of the social history of Bengal opine otherwise. As the lawyers say that the legal concept regarding the applicability of law in the case of a Hindu is clear in their mind: a Bengalee-Hindu is governed by Dayabhaga a non-Bengalee Hindu by Mitakshara. The habitat does not affect his juridical position. Kumarila's annotation of Jaimini's aphorism 1. 3. 19 explains the situation, that usage cannot be localized. The people of a particular province of India, when settle in another part can keep in vogue the usages and religious rites of their original birth place.[42]

41. A gentleman of the Agarwal Community and settled for a long time in the district of Malda, told the present-writer: "I am a Bengalee. we have adopted Dayabhaga in our family".
42. This interpretation of Jaiminis dictum reminds us the utterances of the great French revolutionist Danton when advised to flee from the

Thus in consonance with the data that we have got to-day, we can safely say that Manu's law had been in vogue at least in the East. From Manu sprang the latter-day legislators whom we trace after Srikara. Whatever might be the date of its composition, Dayabhaga only re-stated the old doctrines. During the age of Brahmanical revival it embodied the current doctrines in one text for everybody's use.

The peculiarity of Jimutavahana is that he used a wider range of authorities for his writing. He never disowned Yaj. rather two of the authors he mostly quoted were Manu and Yaj. He did away with the clannish idea of succession. He not only accepted the agnates, but also the nearest cognates in the order of succession. Thus he took the father sibs as well as the female sibs in his range of succession. In other words, by opening the door of chances of succession to the agnates and the cognates, he widened the right of inheritance to the tribe, which in Bengal meant to the other members of the nation. Secondly, he did away with the archaic notion of two kinds of properties. Thirdly, he did not accept, the doctrine of "common ownership" of grand-father's property. Fourthly, he laid down one mode of succession. His law does not belong to the feudal order of society. It is a step more advanced than of the Feudal Age. We shall have to account for this bifurcation of the Hindu law in the East. Mayne and Iyengar have said that both the Schools have bifurcated themselves on the ground of each one being based on different local customs. Thus say Mayne and Iyengar: "We have already seen that the doctrine of Jimutavahana was derived from a more ancient tradition and is authoritative an exposition from one of the two ancient schools of Hindu law as Vijnanesvara's theory of right by birth is of the other. Probably the opinions of Manu, Narada and Devala had from early times more influence in Bengal than those of Yajnavalkya. The two schools must have represented the customary law of different

country of the reign of Terror: "Man, can anyone take off his country from the soles of his feet". In a certain stage of social development, when a people is identified with his habitat, he cannot divest himself of the influences of his Janapada. Since, mediaeval days, India is in that stage of evolution.

parts of India and were probably not the result of a difference in later legal theory. The exposition in the Mitakshara..and the exposition in the Dayabhaga negating it, are both largely dialectical. Their conclusions alone are material, and their long and undisturbed acceptance..warrants the inference that each school was concerned in giving its own legal formulae from its customary law, thus establishing, on a firm basis what before us was not quite settled".[43] Elsewhere the authors admit that "so long the family retained its patriarchal form...the doctrine that property was by birth..had then no existence".[44]

This admission of the latest Juristic text helps us to a certain extent. All the old cant about Jimutavahana's Dayabhaga, that it was a modern book influenced by Shariat law of Islam is set aside. The authors in question have admitted that the doctrines of Dayabhaga are derived from more ancient tradition, and this text is also an authoritative exposition of one of the ancient schools of Hindu law. In this way, it drives a nail in the coffin of Maine's theory of the doctrine of common ownership being the most ancient Hindu law. Again, when the authors say that probably both the schools represent the customary law of different parts of India, they help us in our investigation. We are searching for those customary laws. In our investigation we have seen that the ancient Indo-Aryan legal traditions do not speak of common ownership, but suddenly it crops up in Yaj. and is put up as the basic formula in Mitakshara. Hence, the question arises regarding the usage that is supposed to be its basis by abovementioned Jurists. We have already said that so far as the data are available it is not an Indo-Aryan usage. Probably it has been introduced by the hordes that settled down in India as good Hindus. It might have been their custom which spread over by the means of diffusion of culture.

By reading the text of Jimutavahana it is apparent that he fought tooth and nail against this doctrine as unorthodox. He quoted text after text of ancient period to disprove the theory of common ownership. Even he gave a plausible explanation to the

43. Mayne and Iyengar: op. cit. pp. 334-335.
44. Ibid. op. cit. p. 325.

famous dictum of Yaj. II. 122. Dr Jolly admits that the opinions of Jimutavahana were neither peculiar to himself nor to the Bengal school of lawyers.[45] While Jayaswal considers that the germs of the Bengal School of Hindu Law are to be found in the laws of Arthasastra of Kautilya and Dharmasastra of Manu.[46]

In examining the data that so far we have got before us, we cannot conceive that Yaj. or its commentary Mitakshara had been prevalent all over India prior to the Turkish-Moslem invasion. As early as 571 A.D. in the inscription of the Balabhi King Dharasena of Guzerat, it speaks of a king as one who obeyed the rules composed by Manu[47] Another inscription issued from Balabhi dated 535 A.D. speaks the same thing[48] The Burmese are governed by *Manusammata* which are based on Manu introduced by Buddhagosha, the Buddhist apostle of Further India.[49] In Cambodia and Siam the laws are based on Manu. In Indonesia,[50] it was the law as it has been traced by the investigators before it succumbed to Islam. But in Bali it still holds its sway.

If Yaj. or the Mitakshara had been in vogue all over India before tenth to twelfth centuries A.D. then, how is it that the Varman, Sura and the Sena Kings did not introduce it in Bengal when they settled down as rulers in that province. Similarly, how is it that all the Brahmans and the upper castes of Hindus of Bengal tracing their descent from the North and the South, did not keep up their old laws as hereditary usage that is allowed by the Mimamsaka authorities? It is those who after what the present-writer calls *Second Social Integration* of Bengal, that closes about sixteenth century A.D. came from outside and settled in Bengal, remained outside the pale of older Bengal Community and have adhered to Mitakshara.

Thus, with the data before us we are clear that Yaj. had not been universal in India, and the Mitakshara got its popularity

45. Jolly "Tagore Law Lecture". p. 109.
46. K. P. Javaswal: "Manu and Yagnavalkya". Pp. 255; 263.
47-48. Fleet's Gupta Inscriptions: P. 165; Ind. Ant. Vol. IV. P. 105.
49. Vide Forehhammer's Sources and Development of Burmese Law 1885.
50. Vide E. C. G. Jonker: An Old Javanese Law Book, 1885.

during the Moslem rule, and its significance in the British-Indian Courts. Yaj. and Mitakshara had not been in vogue in Bengal during the Hindu rule. As West and Majid say: "The Gaudiya or Bengal School.....is a patriarchal system and differs in essential particulars from the Mitakshara. It appears that the teachings of Gautama[51] bore fruit amongst the enlightened people of this part of India, from where the Hindu law moulded the lives of peoples inhabiting diverse climes such as Burma and Nepal. It asserted itself with renewed vigour in the fifteenth century, (2) when Jimutavahana wrote his famous Daya-bhaga, when the forceful contact with another patriarchal system of law—the Molsem—was felt".[52] Regarding the latter part of this opinion we will speak later on.

Now we will revert to socio-economic environment which gave rise to the peculiarity of the doctrines as embodied in Dayabhaga. In the first place, as far as we can trace its history, Bengal has been inhabited by a homogeneous people. Since the post-Mauryan epoch the people have not been divided into tribes and clans. It is evident that the ancient tribes who existed in this province have been transformed into castes with certain status in the Hindu society. The Palas united the different Janapadas (localities) into one Bengal which existed as such till its fateful partition in 1947.

Again, all the local Kingdoms that arose in Bengal after the Gupta rule, were not tribal or clannish in their organization. They were national in character. Then arose the great Pala dynasty which was of local origin from Varendra (North Bengal). Next came the Brahmanical ruling dynasties which though coming from outside bore national characters. It is true that the Palas and the Senas intermarried with the Rashtrakutas and the Chalukyas, but they did not establish any clan rule in Bengal. There was a homogeneity in Bengal society and administration. It is true that as a legacy of the Gupta rule, Bengal had a feudal administration. But we have seen that Srikara echoed Manu's dictum, and later, Jitendriya, Balaka, Balarups, Halayudha

51. The logician is meant here-vide West and Majid. p. 11.
52. West and Majid: op. cit. p. 54.

the Jurist, Nirabadya Uddota did not speak of common ownership in grandfather's property. They were contemporaneous with the Pala and Sena rules. From this we adduce, that though being feudalistic in social and political stuctures, the exotic influence that we trace in Yaj. and Vijnanesvara did not make itself felt in Bengal. Here, the people discussed on Gautama's logic, Jaimini and Kumarila's Mimamsa philosophy, and above all Manu Smriti. It is true that Yaj. was not unknown to them, and in later days Sulapani wrote a commentary on Yaj. But that does not prove that Yaj. text was the law in Bengal at any time. Rather it can be pointed out that Sulapani was a Brahman from Mithila and settled in Sahuria in West Bengal.[53] Regarding it P. Ghose says, "In fact, if Sulapani and other Bengal writers had followed the Mitakshara, standard writers of the Mithila School or of the Banaras School.....would not have been seen constantly refuting their doctrines".[54]

Thus in a homogeneous society bearing the ancient patriarchal form, the ancient traditional law of the Indo-Aryans has left its impress. Hence, there was no talk of common ownership, only one kind of succession to ancient properties, and the society being a homogeneous one, the order of succession was extended to the agnates as also to the cognates i.e. to the members of the nation in order of propinquity.[55] In this way, the law of Dayabhaga became a territorial one. It is the national law of the Bengal Hindus.

Now let us see what Jimutavahana speaks himself of his own doctrines. He begins thus:(ff)

"Without discussing thoroughly the sayings of Manu and others, those who dispute (about inheritances), for their understanding I will expound the Dayabhaga, the wise men hear it" (1).

53. Vide "Vyavastha Darpana". Vol. I. Preface, p. vii.
54. P. Ghose: The Calcutta Law Journal. Vol. 26. 1917. "Jimutavahana".
55. Vide the opinion of Calcutta High Court. Ghose op. cit. Vol. I. pp. 50-51.

ff. Vide Colebrooke's translation.

WHAT IS DAYA

"Now I am determining the division of Daya; about it Narada (13. 2) says: 'When the sons partition father's wealth, then it is called Dayabhaga, the wealth which is divided is called by the wise men as the object of dispute' (2). What happens to the father's means is that after the death of the father the ownership (Svatva) devolves on the son (3). Thus the old ownership being destroyed when a new ownership accrues on the wealth, then the word *daya* is applied to it (5). When Narada has said, "after the passing away of the father the sons will partition the father's wealth' (13. 2) is to be understood that the sons have got no ownership (Svatva) before division; again division only cannot be the cause of ownership. In that case, a mendicant by dividing the wealth of a non-related person can be an owner of the same. But it is illogical (9).....Hence, it is decided that after the death of the parents, the sons claim the wealth to be theirs; again, when in the case of the only son the ownership is acknowledged without division, then it is not illogical to say that the death of the parents gives rise to the ownership to the son".

BIRTH IS NOT EARNING

"Well, when the earning of an earner is called earning-effect, and with that effect he who becomes the owner of the amount is called the earner; with this argument in the case of succession, the birth of a son is his earning, hence let the son in the life-time of the father have ownership on his father's wealth and not after his death, as had been said in some books that birth itself is earning as the son in his father' wealth. This is not reasonable as it contradicts the Smritis like that of Manu and others (10).....As Manu has said, 'after the demise of the father and the mother the sons getting together will partition the father's wealth equally, in the life-time of both parents the sons are powerless to partition (9. 104)'. Regarding the question that in the life-time of the parents the sons do not get any share, the answer is that in that time, the sons had no ownership over it (Manu 8. 416). Again, Devala also has clearly said that during the life-time of the father there is no ownership of the son in his wealth viz., 'after the demise of the father the

sons will partition father's wealth, as there is absence of ownership of the son when the father is alive' (11). And when it is said that while the father is alive, the son having ownership on it can divide the property against the will of the father, as the ownership is dependent on birth is without any proof (from the sastras)".

BIRTH IS NOT CAUSE OF OWNERSHIP

"Again, none of the Smritis have mentioned that birth is an 'earning'; but when in some authoritative text it is said that 'birth' is the cause of ownership that is not in direct relationship, the ownership of the son arises after the death of the father. That father is the cause of the sonship due to the birth of the son. This sequence is to be understood" (12).

TIME OF PARTITION

"In this wise, the destruction of the father's ownership is one of the times of division, another time is when the father wills it without his ownership being destroyed. The opinion that there are there times for division, (1) after the death of the father, (2) after taking the monastic vow of the father and the menapause of the mother, (3) the will of the father, are not acceptable "[56] (20).

DIVISION OF GRANDFATHER'S PROPERTY

"The time of division of grandfather's wealth is once after the death of both the parents, the second time comes after the menapause of the mother when the father wills the partition.[57] There cannot be any division without the will of the father. As said in the dicta of the rishis, viz., Manu, Narada, Gautama, Baudhayana, Sankhya, Likhita, etc. which have proved the absence of the ownership of the son in the property of the father during his life-time, the division depends on the will of the father. Again, having not appointed any different time for the division of grandfather's wealth, it it to be understood that there

56. This is a rebuttal of Mitakshara's dicta.
57. The annotator Srikrishna Tarkalankar has fixed one time for partition of father as well as of grandfather's property.

is no ownership of the grandsons in grandfather's wealth and its division depends on father's will (24)".

"But as Yajnavalkya's dictum '*Bhurya....cho vayoh*' appears to stand in opposition to it, it is to be understood that though the literal interpretation contradicts the above mentioned dicta, but according to the explanation of *Nirabadya viddodyata*[58] which says: when one of the two brothers in the life-time of their father dies leaving a son, and the other brother survives, later on the father dies, then the danger arises in such a form as 'let the surviving son on account of the nearness of propinquity acquire all the property of the father'. Hence the 'equal ownership' (vide Yaj. II. 122) has been spoken of. This means that as the ownership of grandfather's wealth devolves on the son, likewise, after the demise of the father, the ownership will descend to his sons, there will be no difference in the matter of nearness or distance of relation; as the paternal uncle and the son of the deceased brother both are entitled to offer *Parvanna pinda*, thereby there is no difference in bestowing religious bliss to deceased original owner, (the father of the son and grand father of the grandson). Hence, after the death of the father and the grandfather, the great grandson by offering *Parvanna pinda* becomes equal partner in the great grandfather's wealth along with the son and the grandson of the deceased. But in the life-time of the father, the ownership of his sons over their grandfather's property is acknowledged, then in the case of division of father's property between the two brothers,—one of them having a son and the other is sonless,—their sons i.e. the grandsons get the choice of getting shares of their grandfather's property. But it is illogical. Hence it is to be understood that the fatherless nephew has got equal right with the uncle. As regards the term *Nibandha* (vide Yaj. II. 122) it means the sum of the allowance that is fixed to be paid in certain month. As regards *dravyam* it being connected with land (Bhu), it means bipeds i.e. slaves and also things (25). Or it may mean what the

58. *Uddotana* is the name of a person. He is quoted in *Vyavahara nirnaya* (pp. 78, 455) as an ancient author on Vyavahara. Vide Kane, Vol. III. 356 foot note. Srikrishna Tarkalankar took the name as the name of a book.

Pandit Dharesvara has explained: 'The sons have equal ownership in grandfather's property when the father voluntarily divides it'. It means, the father cannot partition it among his sons in greater or lesser portions like his self-acquired property. As Vishnu has said: 'If the father wants to partition his wealth among his sons, his will is the directive of his self-acquired property; but in the grandfather's property the father and the son have equal ownership'. Thus it is clear that if the father want to divide his wealth among his sons, then he can arbitrarily partition his self-acquired property, but it is not possible in grandfather's property. Whereas there is equal ownership between the father and the son, the father has got no arbitrary will in his father's property. Hence by noticing equal ownership in grandfather's property, some say that there should be equal partition of grandfather's property between the father and the son; some say inspite of unwillingness of the father, the division will take place according to the will of the son. But these two opinions are not to be accepted. Likewise all the contrary dicta are to be explained"(26).

RIGHT TO ALIENATE GRANDFATHER'S PROPERTY

"Hence it is settled that two shares go to the father out of grandfather's wealth, and the partition shall take place on the will of the father and not of the son. And the recovered grandfather's property which is to be regarded as self-accquired by the father shall not be partitioned by the latter (among his sons) if he wills it. As regards Yaj. saying that father is the master of pearls, coral, etc. all movable properties, but of all immovable properties neither the father nor the grandfather has got lordship, yet, the word "all" being used, the gift of the immovable properties equivalent to the maintenance of the dependants is forbidden, as Manu has ordained that the maintenance of the dependants is meritorious for the way to Heaven. Hence, the gift of small amount of grandfather's immovable property without detriment to the maintenance of the dependants is not forbidden, otherwise the saying 'all' becomes useless, the gift of Nivandha and the bipeds follow the way of 'staff and sweet bread argument' i.e., the gift of one follows the other or by carrying the staff

one carries the bread. (The movables follow the rule of immovable). If the maintenance of the dependants is impossible without selling all the immovable property of the grandfather, then for the sake of necessity the sale of the said immovables is justified. Again, for the maintenance of oneself the sale of everything is justified though it is oppressive to the dependants. Its proof is that by all means one should save himself (27).

If any one says, the divided immovable property and undivided general goods cannot be sold or gifted without the permission of the coparceners, we find that Vyas' dictum did not mean it. It seems, he meant that on account of one's right of ownership if he sells his property to some bad party, the seller suffers from non-religious acts by oppressing his relatives, hence the prohibition; otherwise the sale, etc. are not unjustified (*Asidhya*). And the aphorism about gift and the sale of the selfearned immovable property and bipeds without the permission of the son and the grandson, must be settled in aforementioned way i.e., the duty is to be understood in the aphorism. It becomes *adharma* in disregarding it, but gift and sale cannot be invalidated. Inspite of hundred aphorisms the actuality (Vastu tatva) of ownership cannot be altered (*vachana satenapi Vastu no anyatha karana-sakteh*) i.e. 'a fact cannot be altered by a hundred texts'.[59] As Narada says, 'when one has got wives of different Varnas and have got children of different varnas.....yet if not united in all works, they give away or sell their shares they can do it according to their will, because they are certainly masters of their own properties" (28).

JOINT-FAMILY

Finally, comes the question of Joint-family. We have already said that the ancient Indo-Aryan society was a patriarchal one. The patriarchal family of those days consisted of the *Kulapa*, i.e., the Grihapati, his sons and descendants. This must have given rise to the joint-family system as "single family" system did not develop as a general rule in India. Thus the normal condition of a Hindu family had been a joint one as long as the head of

59. Colebrook's translation.

the family lived. But breaking away from the joint-family also took place as the legislations spoke of the case of Joint (*Samsristi*) and re-united persons and their legal rights in the undivided family properties.

This being the case, the Bengal Hindu family is a joint one. It is not a fact that it is an old type of patriarchal system, hence given rise to Dayabhaga rules. In this matter Mayne and Iyengar say: "A joint Hindu family under the Dayabhaga is, like a Mitakshara family, normally joint in food, worship and estate. In other respects too, there is little or no difference between a joint family under the Dayabhaga law and one under the Mitakshara law, may consist of ancestral property, of joint acquisition and of self-acquisitions thrown into the common stock.[60]. The doctrine of self-acquisition in connection with a Dayabhaga family is the same as in a Mitakshara family,[61] but there are two salient points of difference between the two systems." The abovementioned authors while discussing the differences between the two, say: "It (Dayabhaga) considers the brothers, or other collateral members of the joint-family, as holding their shares in quasi-severalty, and consequently recognises the right of disposing them at their pleasure, while still undivided; it recognises the right of a widow in an undivided family to succeed to her husband's share if he dies without issue, and to enforce a partition on her own account."[62] Golap Sarkar Sastri says: "It is after the death of the father, that the sons may, agreeably to the modern view of ancestral property, really become members of a joint-family. According to the theory of Dayabhaga School they become tenants-in-common.....in respect of the estate inherited by them from their father".[63]

WIDOW'S RIGHT

In this matter Mitakshara says: "Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a

60. Vide Rajanikanta Pal vs. Jagamohan Pal (1923). 50 I. A 173. 50 Cal. 439 in the case of Dayabhaga; Saroj vs. Ratanlal (1917) 44 I. A, 201, 40 All 159 in the case of Mitakshara.
61. Mayne and Iyengar: P. 378.
62. Mayne and Iyengar: P. 59.
63. G. C. Sarkar Sastri: "Hindu Law", 8th Ed. 1940, p. 466.

man, who being divided from co-heirs and not subsequently re-united with them, dies leaving no male issue" (II. 1. 39). But in later period this rule had not been followed (vide rules regarding women under Banaras School). On the other hand, Dayabhaga says: "Let her enjoy her husband's estate during her life; and not, as with her stridhana, make a gift, mortgage or sale of it at her pleasure" (57). Thus a widow in Bengal gets a life-interest in her husband's property if he leaves no male issue and can get a partition of the property from her husband's relatives with the provision that the interests of the presumptive heir are not affected (vide case Mahadeo vs. H. Narain (1883) 9 cal, 244, 250).

Did this rule accentuate the frightful toll of *Sati-daha* in Bengal?

INFLUENCE OF SHARIAT LAW

Finally we come to the charge of Shariat influence in Dayabhaga. It is alleged that Jimutavahana was under the influence of Islamic culture when he formulated his rules about succession. But we have seen that the process of dialectics working through time has brought out masses of facts to disprove this allegation. Still for the doubting Thomases we quote the following fact of Islamic laws.

The Islamic law though regarded as a complete break with pre-Islamic usages of Arabia, yet as said by Justice Tyabjee, "A good many of the old customs must be lying embedded in the Traditions themselves. For taking the usual classification of the 'Sunna'.....the Sunnat-ul-Taqrir-(that which was done in his (prophet) presence without his disapproval) the last must have represented largely the original customs and usages of the pre-Islamic Arabs".[64] Justice Abdur Rahim says, "The Arabs had their own laws which they followed, and Islam maintained some of them and repealed others".[65] Again he says elsewhere: "Those customs and usages of the people of Arabia, which are not ex-

64. Faiz Badaruddin Tyabjee: "Principles of Muhammadan Law" P. 78. 1913.
65. Rahim's articles in the Columbian Law Times. Vol. VIII pp. 101, 196, 255.

pressly repealed during the life-time of the prophet, are held to have been sanctioned by the Law-giver by his silence".[66] Further he says, "The Muhammedan code in fact, includes many rules of pre-Islamic customary law which have been embodied in it by express or implied recognition".[67]

In this wise, there is a streak of pre-Islamic customs and usages in Shariat Law of Islam. Thus says Tyabjee: "The Muhammedan law of succession consists of (1) the rules relating thereto in the Quran or inculcated by the Prophet in his teachings; and (2) the customs and usages prevailing amongst the Arab tribes near Mecca and Medina at the time of the Prophet in so far as they have not been altered or abrogated by the said rules and teachings".[68]

Tyabjee says that according to the pre-Islamic customary Law, the nearest male agnate or agnates succeeded to the entire estate of the deceased. Again, the descendants were preferred to ascendants and ascendants to collaterals.[69] The Islamic amendments to this ancient usage are thus: (1). "The husband or wife and females as well as cognates are recognized as competent to inherit; (2) Parents and ascendants are given a right to inherit even when there are (male) descendants".[70]

OWNERSHIP

A. Rahim says: "It is in the very conception of property that the owner may use and enjoy it as he chooses. Muhammedan law as a rule does not recognize *Joint-tenancy* in the sense of the English law".[71]

Then comes the sectarian interpretations of Quran. The Sunni interpretation is, that "the customary heir (male agnate) is not absolutely displaced. Agnates continue to have priority over cognates". Thus in Sunni law the agnates continue to be preferred to the cognates as there is no general statement in the Quran altering that rule.[72] The Sunni interpretation of succes-

66. Abdur Rahim: "The Principles of Muhammedan Jurisprudence, pp. 136-137.
67. Rahim: "The Principles of Muhammedan Jurisprudence". p. 2.
68-70. F. B. Tyabjee op. cit. pp. 554, 555, 556.
71. A. Rahim: op. cit. pp. 270-271.
72-73. Vide Tyabjee, pp. 558, 559.

sion divides the estates of a deceased amongst the persons entitled to inherit according to the following principles: (1) "The nearest male agnate (or customary heir) is not disinherited, but his rights to the property are liable to be affected by other claimants, (2) where a newly entitled heir is related to the deceased in exactly the same mode as the customary heir, the newly entitled heir takes by way of inheritance half as much as the customary heir. As the newly entitled heirs are generally females, in most instances the males taken twice as much as females; (3) where the newly entitled heirs of the same class differ amongst each other in their series they take equally. The males do not take more than females".[73] On the other hand, according to the Shiah interpretations of law, there cannot be any distinction in the matter of priority between the agnates and the cognates, and the estates devolve upon nearest blood relatives subject to the rights of the husband and wife, who divide it amongst themselves 'per stirpes', allotting to female-heirs half the share allotted to male heir in each grade.[74]

Regarding this matter, it is to be said that the Sunni law leaves the pre-existing rights of the agnates—the customary heirs intact, while according to Tyabjee, the Shiahs have replaced them by new rules consisting of a fusion of the customary law and the Islamic reforms.[75]

CHILDLESS WIDOW AND IMMOVABLE PROPERTY

There is a rule in Shiah law that a childless widow is debarred from inheriting her deceased husband's property in land. In this matter Tyabjee says: "The rule debarring the childless widow from taking portion of the land of her husband is a variation from the Sunni law, and is one of the few instances where Muhammedan law has made a distinction between lands and other property".[76]

Again, *Sharâya-ul-Islam* says: "When the wife has had a child by the deceased, he inherits out of all that he has left; and if there was no child, she takes nothing out of the deceased's land,

74-75. Vide Tyabjee. pp. 560; 650.
76. Ibid. p. 437.

but her share of the value of the house-hold effects and buildings is to be given to her".[77]

RIGHT OF PRE-EMPTION

The Islamic law regarding selling and buying of property has got a rule which is peculiar to itself. If is called the right of *Preemption.* Tyabjee explains it thus: "When a person has the right to have any property transferred to himself on his paying the consideration for which the owner of the said property has agreed to sell it to another, such right is called the right of Pre-emption".[78]

This right of Pre-emption prevails as custom in Behar, Gujerat and Malabar. Tyabjee says that it is not enforceable in those places irrespective of the religious persuation of the concerning parties. Then he says, that, in the absence of proof to the contrary it will be presumed, (4) that "Muslims are governed by the law of pre-emption, and that non-Muslims are not governed by it".[79] But Justice B. Peacock of Calcutta High Court said, "A right or custom of Pre-emption is recognized as prevailing among Hindus in Behar".[80] In the same way, Justice Mahmood expressed the view, that "the Pre-emption as it prevails in India is borrowed from the Muhammedan law and seeing the advantage they, attempted to neutralize.....by an interpretation in the Tantra in question" (*Mahanirvana Tantra*).[81]

Finally it is to be said that the Islamic law is not territorial but sectarian as different sects have different interpretations.

Now, coming back to Dayabhaga rules, do we find any borrowings from the Islamic laws? Bengal Hindu family is not the same kind of patriarchal system as of Arabia or of ancient India. It may be possible that with the increase of the family, those who broke away—formed single families, and those who stuck together—formed the joint families. But these families

77. Neil B. E. Baillie: "Digest of Muhammedan Law". Vol. II. p. 295. 1865-1869.
78. Tyabjee: op. cit. p. 437.
79. Vide Tyabjee: p. 440.
80. Fakir Rawat vs. Emambaksh (1863) Ben. L. R. (Supp. Vol.) 35; 35 W. R. Sp. No, 143 (F. B.) cf. 14 Bom. L. R. 436, (P.C.).
81. Gobinda Dayal vs. Inayetulla (1885). 7 All 775 (F.B.).

generally consisted of the father and his sons. After the demise of the father, the brothers might separate or remain united. In the long run, the cousins separated themselves. This has given rise to the united and re-united questions in Hindu law.

Regarding the question of influence of Islamic law, it must not be forgotten that the said law as has been current in Bengal has been Sunni one. Sunni influence is prevalent among the Moslems of Bengal. We have already seen that in Sunni law the agnates have got a priority over the cognates. But in Dayabhaga it is not the case. It speaks of priority of right of religious obsequies. Then the rules of partition of Islamic law do not agree at all with any school of Hindu law. Again, the women's right to succession is limited by its rules. On the other hand, the Quran says, "Men ought to have a part of what their parents and kindred leave; and women a part of what their parents and kindred leave: Whether it be little or much, let them have a determinate portion" (Quran. IV. 9. 10). Further, there is a fundamental difference in the scheme of succession between the Shariat law and the Hindu schools of law. Again, the Shiah rule of succession which obliterates the distinction in the matter of priority between the agnates and cognates though seems superficially similar with Dayabhaga, yet in the scheme of partition is absolutely different.

At the end comes the question of the right of Pre-emption. It is absolutely unknown is Bengal school of Hindu law. Thus comparing the Dayabhaga school of law with that of Shariat one or the sectarian variants of it, has been improperly said that there has been an influence of Islamic law in the Bengal school of Hindu Law.

V

PARALLELS OF LEGAL TENETS

Now we will make a comparative study of the Legal systems of other countries in order to understand the development of Hindu Law.

(i) The most ancient countries

First we come to Egypt which has so long been regarded as the oldest civilized country in the world. Egypt in her Pharaonic period had a set of law. King Menes is regarded by tradition to have been the first law giver of Egypt. He was supposed to have lived in 3200 B.C. Regarding this law giver Wigmore remarks: "But an astounding coincidence this name of the first human Law-giver, as handed down by tradition, was substantially the same in three of the oldest civilizations—Menes in Egypt, Minos in Crete and Manu in India".[1]

Regarding law in the old kingdom of Egypt the historian Breasted says, "There was a body of highly elaborated law, which has unfortunately perished entirely".[2] As regards Menes, the first law-giver, he is no longer a mythological person. Breasted says, "The figure of Menes, but a few years since as vague and elusive as those of the "worshippers of Horus", who preceded him, has now been clothed with unmistakeable reality, and he at last steps forth into history to head the long line of Pharaohs, who have yet to pass us in review".[3] According to him, his native city was Thenis, somewhere in the vicinity of Abydos. The same historian says, "He was buried in Upper Egypt, either at Abydos near his native city Thenis, or some distance above it near the modern village of Negadeh where a large brick Tomb, probably his, still

1. I. H. Wigmore: Op. cit. pp. 17-18. There is also another coincidence between Manu, Nu of Babylon and Noah of the Old Testament. All of these were saved from the Deluge. Manu's salvation from the Deluge in a vessel is mentioned twice in the Vedic Literature.

2-4. J. H. Breasted: "A History of Egypt." 1911. pp. 81, 36-37,, 37.

survives. That and similar tombs of his successors at Abydos, written monuments of his reign have been found".[4]

This discovery is mentioned here so that the Indo-Aryan Manu may not be after all a myth. There had been several Manus mentioned in the Vedas, and the Manu-Smriti speaks of eight Manus (I. 36). After all it is probable that there was a family of that name.

Next we turn to Mesopotamia. The ancient Sumerians had a civilization. They had a Legal system as well. But the investigators conjecture that after the Babylonian conquest of Sumer, King Hammurabi adopted a good deal of the earlier codes in his code. From the ancient records of Babylonia so far discovered, we glean from one of the records (circa. 2060 B.C.) that it speaks of a law suit over a Will literally called "contracts of heirship". This case-law bespeaks that there was private property in land.

Coming to Assyria, we find as Diamond says, "That the tablet dealing with land law consists first of five clauses concerning the undivided estates of brothers, who have jointly succeeded to an inheritance".[5] From this we do not glean much regarding the Law of Inheritance.

Then Coming to the contemporaneous Hettite people of Asia Minor who are supposed to have been a people speaking Indo-European language of the Centum group, we find that their law chiefly dealt with land held on feudal service, and offences to property. But the rules of property law are almost entirely absent from the code.[6]

From these records so far discovered we do not get clearer views about the law of private property. We only glean this much that there was a sense of Private Property and we do not hear about tribal or family communism or collectivism in property.

(ii) The Ancient Iran

As a study of ancient Indo-European laws cannot be complete without a study of the law of ancient Persia we should delve in

5. A. S. Diamond: "Primitive Law." 1950. p. 36.
6. Op. cit. p. 44.

Iranology to find out the facts. Through the repeated foreign invasions have destroyed the cultural remains of that ancient country, yet what have been recovered by the patient researches of the scholars help us a good deal in our present investigation.

Dr. Dhalla says, "The basis of Iranian society is the family. Parents, children and those connected by blood, living under one roof, constitute a family. Every family had its own fire, which was kept burning day & night, and was never to be extinguished".[7] Here we get an echo of the family life of an Arya of the Vedas.

As regards the family group, the same investigator says: "The Iranian families were as a rule large, and children and grandchildren usually lived together under the same roof. The sons lived with their parents, and, when they were married, their wives came to live with them. Children born of these unions lived and throve in the house of their grandfather. At the death of their father, the sons did not separate, but continued to live under the roof that covered their ancestral hearth".[8] This is the picture of the family life of the Iranians in the Kianian period when the seat of culture and political power was in Bactra (modern Balkh) in the East. This period extended from about 2000 B.C. to about 700 B.C.[9]

In this description we find the usual Indo-European Patriarchal form of family, and in this type of family we discern the Vedic Kulapa and the latter day Grihapati. As regards the position of woman in this society, Dr. Dhalla says, "At home women enjoyed economic freedom.....She owned and managed property".[10] This legal fact seems to echo in ancient Manu's dictum as quoted by Yaska. It seems in the second phase of the cultural evolution of the Iranians under the Kianian rulers, the difference of sib system was being over-ruled by religious differences as Dhalla says, "In the Pre-Zoroastrian, as well as in Zoroastrian Iran, marriages were contracted between the members of the Mazda-Worshipping Community only. Mixed

7-8. M. N. Dhalla: "Zoroastrian Civilization." 1922. pp. 66, 72.
9. Ibid: Vide 'Contents'.
10. Ibid. p. 74; also vide Dinkard. vol. 16.

marriages between Zoroastrians and non-Zoroastrians were discouraged".[11] Again he says, "Marriage regulations evidently permitted alliances between men and women of all the four classes of Iranian society".[12]

From this, we understand that under the influence of religion, the Iranians of the Kianian period were advancing towards nationhood. The agnates and the cognates both were in the order of succession to inheritance.

As regards the origin of law we find, as usual with the Indo-European ideology the claim that it is not a human convention. "It is the expression of Ahura Mazda's divine will for the guidance of mankind. It is a part of religion; it is religion itself".[13] As regards the law of property Dr. Dhalla says, "A section of the *Husparum Nask*, we are informed, dealt with the subject of ownership of property (vide Dinkard, Vol. 10, bk. 8. 35. 1. pp. 30, 31). Articles of law were enacted for the regulation of properties set apart for the religious purposes, as also for inheritance, and possession of private property." Again, "In the lost legal Nasks were discussions of the various disputes arising among the holders of joint property, (vide Dinkard, Vol. 15, bk. 8. 19. 70. p. 77) those about a testator distributing his property before death, the liabilities on the property of the deceased parents and their acceptance or not on the part of the heirs (Dk. vol. 15. bk. 8. etc.), absence of testimony regarding the proprietary rights of one's own property (Dk. vol. 15. bk. 8. 19. etc.), misappropriation of property" (Dk. vol. 15. bk. 8....). Thus we do not find any mention of joint ownership in ancestral property.

Enquiring about farming, we find the texts speak of different grades of ownership in land (Dk. vol. 16. bk. 8. etc.). It is seen that several persons often combined to cultivate large areas in partnership. The feudal chiefs and big landlords hired out lands to small tenant-farmers to cultivate their lands for a stipulated fixed share of the crop. Thus there was crop-sharing in vogue at that time. Again Geiger says that the warrior or knightly

11-12. Ibid. p. 78.
13. Vide Dhalla. p. 141.

class lived together with the great landlords who were called *kshatras*, and the class of small farmers formed the majority of the people.[14] Here also we do not find communal collectivism of the cultivating people. The life of the Iranians in the time of Zoroaster, according to Dhalla,[15] was merged in the unity of the largest aggregate of society, the community or nation.

Then comes the Achaemenid period (558 B.C. to 330 B.C.). In this age, the centre of Iranian life shifted to Paras. The Persians settling on ancient Elam took the lead in Iranian life. In this historical period, descent was traced from the male line and *paterfamilias* was the rule. In this age, as stated by Dhalla, social usages were more partial and favourable to a man than to a woman: It is apparent that women held an inferior position than their sisters of Eastern Iran as depicted in Avestan texts. Thus we do not hear of equal legal rights of women with men in this period.

Then comes the Sassanian period (226 A. D. to 651 A. D.) during which time Iran was resurrected to a new lease of life. In this age, the family was the social unit as before and kinship was reckoned through the father. The cult of the ancestral dead used to be observed as piously as before, and the fire of the family hearth used to be kept as jealously as before. The institution of adoption noticed in the Kianian period existed in Sassanian period, and it still exists with the modern Zoroastrians. This usage of adoption had been a religious act. Its object was to preserve the family worship. It was a part of the cult of the dead. The religious aspects was stressed so strongly that a later text called *Sar dar* declared that an individual's salvation was impossible if he died without a natural or an adopted son![16] Thus so far, we find these usages agree with Indo-Aryan and with those of the classical Indo-Europeans.

As regards the rights of women, it is said that "women in Sassanian Iran, owned property, officiated in minor ceremonies, and acted as a guardian of the family, when no male member was

14. H. Geiger: "Ostiranischer Kultur in Altertum," pp. 477-479.
15 Vide Dhalla. p. 65.
16. How strongly it sounds Brahmanic-like!

living to guard its interests".[17] On the other hand, the women of this period were not held in high esteem by the Pahlavi writers as did the writers of the Kianian or Avestan period.[18] Thus we find, that out of repeated foreign subjugations and devastations, when Iran was resuscitated and Zoroastrianism became the ruling religion,[19] women regained their position again. Perhaps the spread of Avestic rules is accountable for it.

Regarding the law of inheritance of this period, "the law of testamentary succession laid down the rules, according to which a person bequeathed his property to his heirs.....If an individual made his will on his death-bed and bequeathed his property, to the exclusion of their heirs, the aggrieved ones could have the testament declared null and void by a court, if it proved that the deceased was not in full possession of his mental faculties".[20] Dadistan-i-Denik 54. 6-8). Again "if a man died intestate, each of the sons and unmarried daughters received one share, and the widow twice as much".[21] In this period the priesthood attained great power and was feared by the King. The King showered gifts to the priests and large estates were attached to the great temples.

Thus tracing the legal history of ancient Iran, we do not find any evidence of joint-ownership in ancestral property. The family was patriarchal and like that of ancient India three generations lived under the same roof. But there is no record of family collectivism or joint-ownership of family property in ancient time as described by Henry Maine to have been the primitive mode of family law. On the contrary, from the evidences we have in record individual property was in existence. Also there was private property in land. From the records mentioned by the investigators we find that land was falling in the hands of big estate-holders, and the cultivators toiled and sweated in tilling these lands to eke out a miserable existence. Serfdom was also in existence.

17-18. Dhalla. p. 300.
19. The conversion of the whole of Iran to Zoroastrinism during the Achaemenid period is doubted by many historians. The tombs of the emperors and other records attest to this doubt.
20-21. Dhalla. p. 323.

In the Sassanian period we see the rise of a so-called Communist movement under one Mazdak who was at first favoured by the Kink Kavodh I in order to weaken the power of the aristocracy and priestly orders.[22] Mazdak started a religious-socialist doctrine that the people should have land and wives in equal proportion. This movement spread over Persia and Armenia till it was destroyed by Kharan Naoshirwan in 528-529 A. D. From this movement we see that the common people were being deprived of land and wife which were being multiplied in the hands of the rich people. If there had been joint-ownership in landed property or communal ownership in land, then there would not have been any cause for such a movement which reappeared in Iran in Muhammedan period often and anon in different garbs.[23]

22. Th. Noeldeke: "Aufsaetze Zur Persischen Geschichte," 1887, p. 112.
23. Vide P. Brown: "A Literary history of Persian Literature"; Dhalla: "Zoroastrian Civilisation" p. 330.

(iii) Classical Countries of Europe

When the Hellenes were mentioned in literature of Homer, they were in Mycenaean stage of civilization. Long ago, they had passed out of the nomadic stage. The Homeric heroes were in their feudal stage of political evolution.[1] Henry Maine's contention, that the ancient Greeks had joint-ownership in their properties and that was their archaic condition of family relations, cannot be substantiated by modern investigations. According to de Coulanges, an age has not been found out when soil was common to the nations of Greece and Italy, nor there had been anything resembling the annual allotment of land like the Germans of Caesar's time.[2] The same writer says that the error of expressing the opinion that property at Rome was at first public and became private at Numa's time was due to a false interpretation of the passages of the writers like Plutarch, Cicero and Dionysius. And as to the Roman soil—*ager Romanus*, it was private property from the origin of the city.[3]

According to de Coulanges, it was the old religious rules that required every family to have its gods and its worship in a particular place on the soil, its isolated domicile, necessitated its property.[4] Hence, he says that it is manifest, "that private property was an institution that the domestic had need of".[5] Thus domestic religion guaranteed the right of private property and not laws.

That this religious injunction posing as law was so ingrained in the Hellenic mind that Plato had to accept it when he said, "Our first law ought to be this: Let no person touch the bounds which separate his field from that of his neighbour, for this ought to remain immovable".[6] Here, de Coulanges compares it with the

1. Max Beer: "Social struggles in antiquity":
2. Vide F. de Coulanges: "The ancient city." p. 77. 1916.
3. Ibid: Ditto.
4. How similar it is with Indo-Aryan custom!
5. F. de Coulanges: op. cit. p. 85.
6. Scrip. Rei Agrar. ed. Goez. p. 258. Compare it with the expressions of the Smritis in this matter.

law of Mitakshara as he says, "Among the Hindus, property, also founded upon religion, was also inalienable.[7]

As it has not been possible for the investigators to find out the data of early Greek law, the nature of it is to be traced from Crete about the law of the city of *Gartyna* dating from about 400 B. C. This law says thus: "(25) To the father belongs the power over the children and property, and he may make partition of the property; and the mother likewise as to her own property; but while they live partition is not demandable. Again, in clause 31, the succession is provided to be agnatic, but in default of the gentiles, the property goes to the cognates. In default of the both, the household serfs shall have the property".[8]

Thus we find that the question of the existence of the institution of joint property at the feudal stage of Greece is a debatable one. In the classical period, the existence of a patriarchal family, the head of which was the father having absolute right over the property is discerned. Again, this city-state of Gartyna which had evolved nationhood, had both agnatic and cognatic successions in the matter of inheritance of property.[9]

Coming to Rome we find that Rome was founded by the members of the Latin race. At the time of its foundation it was not in a nomadic stage of evolution. The founders were in the agricultural stage. Nothing is known about the prehistory of the forefathers of the men who founded the city. The prehistoric stage of the Roman city-state and of Roman law coincides with the period of Kingly rule. In this period, it was a state of clans (Gentes). Any individual in order to be a member of the State had first to belong to one of the gentes or clans. The King was the chief of this clan-state who had a council consisting of the elders of the clans, the *Senate,* and the entire body of all the members of the clans, the *Populus.*[10] Again, every

7. He quotes *Mitakshara* from Oriannes' trans. p. 50. He is unaware of another system called Dayabhaga. The saying sounds like Dayabhaga.
8. I. H. Wigmore: "A Panoroma of world's legal system" vol. I. The first part of the clause sounds like Manu.
9. I. H. Wigmore: op. cit.
10. R. Sohm: "The Institutes. A text-book of Roman Private Law." translated by J. C. Leddie. 3rd. ed. p. 34.1907. Compare the early Indo-Aryan constitution with it.

member of this Patrician Senate was "in theory a King and could actually officiate as such as *interrex*".[11] This custom clings familiar to our ears with the description of "Rajasabdopajivina Samgha" described by Kautilya. Again, the Roman family was patriarchal one. Thus every Roman citizen was either a *Pater familias* or a *Filius Familias,* according as he was free from paternal power or not.[12]

According to some, in this period the arable portions of the land of the community ('ager privatus') were assigned to gentes, and not to individuals.[13] The individual husbandry was a part of the husbandry of the clan originally, moveables could be held by individuals as separate property with complete ownership. But when the Roman State ceased to be a State of clans, the notion of separate ownership from moveables to land was extended. Land became a "res mancipii" i.e. "a thing that could be taken with hand." From this time on, land came under free individual possession. But we have alluded above to the opinion of de Coulanges about it. There are differences of interpretation of the earlier Roman records. Sohm says that separate private property arose in the regal period. At this time Rome became a national state. But Hunter says, "From the earliest times of which we have a record, the institution of private property was completely developed in Rome".[14]

From the upshot of this discussion we find that in the prehistoric stage, the development of Roman law was characterized by (1) the preponderant influence of landed property. The clans had common ownership in their lands. But when the land was divided the gentile system disappeared, another system founded on landed property appeared.(2) Already during the period of the Kings, free private property in land as well as in movables appeared before the authentic history of Rome even commenced".[15] Thus Sohm says, "The History of Roman law.... starts at once from the moment the authentic tradition begins,

11. Uommsen: Abriss. p. 306.
12. R. Sohm. op. cit. p. 177.
13. Ibid: op. cit. p. 35.
14. A. Hunter: "Jutroduction to Roman Law" p. 49.
15. Sohm: op. cit. p. 43.

with free private property, in land as in moveables, and this conception of the freedom of ownership becomes henceforth the guiding principle in the entire development of Roman private law".[16]

This change was effected through the growth of commerce. The city-state with its advancement of commerce demanded the free rights of property. It demanded the mobility of capital encased in the form of gentile property. Commerce gave rise to multitude, which broke up the gentile organization in property. This was the natural transition. As Rome was a city-state, law took shape to suit its growing need.

Coming to the Law of Inheritance, we find that in Roman civil Law a family is an 'agnatic family' i.e. those who are held together by *patria potestas*. A woman after her marriage passes in the *manus* (hand) of her husband.[17] In this way, she becomes an agnate of her children.[18] Again, the daughters married outside are not the agnates of their father. Their children fall under the *patria potestas* of their father, and are not agnates of their mothers' fathers. In this wise, the family of the early Roman civil law as embodied in the XII Tables is the agnatic family. It knows nothing of *cognatio* i.e. blood-relationship. But in 367 B. C. the first Procter was appointed to administer justice in the city. Later about 242 B. C. the second Proctor was appointed who became the supreme judicial authority. The Proctor worked out law for foreigners and enacted new edicts.[19]

As regards the right of succession, it was a rule without exception in Greek and Roman laws that property and worship were complementary to each other. In Greek law as quoted by de Coulanges from the saying of an Athenian orator who addresses the judges thus: "Weigh it well, O Judges, and say whether my adversary or I ought to inherit the estate of Philoclemon, and offer the sacrifices upon his tomb".[20] Similar custom is

16. Sohm: op. cit. p. 43.
17. Similar is the Indo-Aryan system.
18. Similar is the Hindu law.
19. Sohm: Op.-cit. pp. 73-76.
20. Isacus IV, 51. Quoted by de Coulanges, p. 94.

expressed by Cicero who says: "Religion prescribes that the property and the worship of a family shall be inseparable, and that the care of the sacrifices shall always devolve upon the one who receives the inheritance". How these are analogous with ancient Indo-Aryan system! The same view has also been expressed by Manu when he says, "Gotra and the succession to property are the causes of offering of Pinda".[21]

Again, the laws of succession in Greece[22] was strictly agnatic. The daughters could not succeed. The succession lay within the sib. In the Roman law, "Agnates are all those who are subjected to the same patria potestas or would have been subject to it if the common ancester were still alive".[23] The unmarried daughter parallel to the provision of law of Manu could inherit her father's property, but the married daughter was excluded from the list of natural heirs.[24] The Justinian code has mentioned the old absolute principle that inheritance always descended to the males.[25] Thus in pre-Justinian time, the succession to the property was confined among man's sib only.

Thus the succession in the Greek and Roman laws extended among the Gentiles only. In this matter, it is similar with the laws of Manu.[26] Hence we find that in the ancient Indo-European laws everywhere, succession was through agnation. But when Justinian extended Roman citizenship to the whole of the empire and promulgated the *Jus Gentium,* the old order was broken. With the promulgation of this new code all were solidified as one nation. There was no question of difference of sib, tribe or race. Hence cognates were taken in the order of succession. The family of Jus Gentium is the cognatic family. It is relationship based on consanguinity.[27] The early law was agnatic, later on due to proctorian edict, the claims of cognatics were asserted. Finally in Jus Gentium of the empire, cognatic relationship superceded the agnatic one.[28]

21. Manu IX, 742.
22. Demosthenes in Boetum Isacus, X, 4.
23. Sohm: P. 449.
24. The Institutes, II, 9-2.
25. The Institutes, III, 1-15; III. 2-8.
26. Manu, IX, 187.
27-28. Sohm, p. 450.

Another peculiar usage with the ancients was the adoption of a daughter's son to ensure the family worship and oblation to the manes. As the daughter after her marriage goes to her husband's sib and worship the family gods and offer oblations to the ancestors of her husband, she cannot inherit her father's property as we have seen above. Property and worship went hand in hand with the ancient Indo-Europeans. Their daughter did not inherit, but the brothers could endow her with a share. But in the case of an only daughter of a deceased person who wanted from her his heir, a subterfuge was necessary. Thus a daughter's son was requisitioned to carry on the oblation ceremony of his maternal grand-father's line. He is called *Putrikaputra* in Indo-Aryan law.[29] Similar was the custom at Athens.[30] This heir was not the grandson of his mother's father, but he had a special name as was the case with the Indo-Aryans to designate him.

Besides this, there was also the adoption system among the ancient Indo-Europeans. A boy from the collateral family used to be adopted by a childless person. But this adopted son could not inherit from two families.[31] The Athenian law was very clear on this point. In ancient Rome a person could be adopted by juristic act and he was counted as a gente.[32] Adoption was necessary in an Indo-European family to perpetuate the family worship and the offering of oblation to the manes. Adoption from another family is as old as the Rig-Veda. Hindu law sanctions it as *Dattaka-putra.*[33]

Adoption is allowed in modern European laws. In Roman law women were incapable of adopting a son. As regards the effect, the old civil law of Rome provided for the father's absolute right not only on the person of the child, but *Potestas;* it also extended to his property. Thus the effect of *Patria Potestas* was a partial destruction of the proprietary capacity of the *Filius Familius.* In this wise, the son had no right of having property of his own.

29. Manu IX, 127, 136; Vashishtha XVII, 16.
30-31. Isacus: VII; X.
32. Sohm: P. 449. The same is the case in Hindu Law.
33. Manu IX, 168; 174. vide *Dattaka-Chandrika.*

Later on, during the Empire, the Roman law gradually established the proprietary capacity of the son. In this matter, there is an echo of Hindu legislation which says that in a joint-family the self-acquired property of the son goes to the father. Finally, the only incapacity under which the *Filius Familius* suffered in *Jus Gentium* known as the Justinian code, was his incapacity to acquire property *"ex repatrio"* i.e. from his own father. Thus, whatever was given by the father to his son, remained in the ownership of the father.[34] This pater-familias system of Roman law and society had no parallel in Indo-Aryan society and legal system which in ancient time divided paternal property equally among the sons and gave them full rights over it. Further according to Sohm, there was no primogeniture in Roman law.

The strange legal fiction of the Roman law was, that hereditary succession took the form of universal succession. It implies that the heir or heirs receive the property of the deceased in its entirety, that is with all its rights and liabilities. Thus the heir succeeds to the whole mass of rights and obligations of the deceased whose property he inherits.[35] That the successor to the deceased should inherit the property with its rights and liabilities has not been unknown to the Indo-Aryan legislators.

Another institution of Roman law was the important class called *"sui heredes"*. It means the agnatic descendants of the deceased who are subject to his immediate power. They belong to the household of the deceased who was a paterfamilias. They are his descendants and belong to his household. The sons, grandchildren by predecessors can be *sui heredes*. On the death of the paterfamilias they become his heirs. "The estate of the father or grandfather, vests in them *ipso jure*. Whether the devolution takes place *ex testemento* or *ab intestate*.....they even become heirs contrary to their wishes. They are *heredes sui et necessarii*".[36] In this paterfamilias system we discern the Vedic *Kulapa* and post-Vedic Gahapati system, and in *sui heredes*, the patriarchal family consisting of the father, the sons and grandchildren. This is the kernel of latterday Hindu Joint-family

34, 35, 36. Sohm: Pp. 485; 501-503; 508.

system. Hunter speaks also of the Roman Joint-family system.

Again, Sohm says, "The influence of the old conception of family ownership is clearly traceable in the rules regulating their succession. The effect of the ancestor's death is merely to vest absolutely a right which according to the older legal view, was already theirs during his life time".[37] Here it seems, we find a distant similarity with Yagnavalkya's theory of "common-ownership" in grandfather's property. Further, Sohm says, "the civil law did not even allow them to refuse the inheritance, because they could not alter the fact that the property of their ancestor already belonged to them as members of his household".[38]

The next institution was the right of Primogeniture. We have already discussed about it when enquiring into the Indo-Aryan legal texts. This institution existed in ancient Greece.[39] Even at the time of Demosthenes, "the privilege of the elder" existed..[40] As regards Rome, there is no clear trace of it as de Coulanges says, "this ancient right of Primogeniture is proved by its consequence, and, so to speak, by its work".[41]

Thus three ancient Indo-European peoples had similar laws regarding inheritance. One is struck by their identical similarities. It has already drawn the attention of some of the legal investigators. de Coulanges called it as coming from the same faith. It is the cult of the dead that brought about the convergent phenomena. This comparative study enables us to understand clearly why is it that from the Rig-Vedic period down to Vignanesvara's Mitakshara, the Indo-Aryans have resisted the admittance of the cognates in the order of succession to property and why the Hindu law save and except *Dayabhaga* has stuck to gentile system of succession. We also understand that standing on this gentile basis, why in post-Vedic period Yaska has denied the equality of brothers and sisters in the property of the father, which he said was contrary to the Veda; also why from the time

37-38. Sohm: Pp. 508; 508.
39. Fragments of the Greek Historians: Didot's Coll., Vol. II, p. 211.
40. Demosthenes: Pro Phorm, 34 cited by de Coulanges, p. 109.
41. De Coulanges, p. 110.

previous to Yaska down to Manu and Yagnavalkya, the Indo-Aryan legislators have refused the daughter's right to inheritance to her father's property, while a person in default of a male heir of the maternal grandfather inherits his property. We also understand the sense of Rig-Vedic utterance, why an unmarried girl asks her share from her father, while the married sisters are denied of any share by their brothers on the demise of their father. Later on, we will find that there are lots of similarities between the Indo-Aryan legal institutions and those of the ancient and mediaeval German legal usages. The orientalists so far made no comparative study of the laws of the ancient and mediaeval Indo-European peoples. It is worth while to make a comparative study in this field of law.

(iv) Germany

A. EARLY AGE

Now let us turn to North Europe. From the very ancient time various Germanic tribes were living in this part of the Eurasian Continent. As has already been said, when Julius Caesar invaded Gaul he had to deal with the Germans. And he has left an account of the Germans as he saw them. According to him, they were nomads; the land which they occupied for sometime was the common land of the tribe. Their wealth and property was in cattle. *Wer-geld* was paid in heads of cattle.[1]

One hundred and fifty years later when Tacitus wrote his book on the Germans, he found the clans occupying different parts of the tribal land for cultivation. Again, these lands were distributed alternately to different clans. Thus there were periodic distribution of tribal land among the clans (sibs). In this stage of evolution, the father had *patria potestas* over his children and his wife. But the power of the father over his children was greater than over his wife.[2] The children used to be under the *seizin* of the father. The word means power over things. When a girl is married and shifts to her husband's house, she ceases to be under her father's seizin and comes under the *mund* or manus of her husband.[3] The word 'mund' like the Latin word 'manus' means the hand which is the natural symbol of power. This signifies that by marriage the daughter goes out of her father's sib to that of her husband. The son also goes out of his father's power when he sets up a separate household.[4] Again, he can go out of his father's power when adopted in another family[5] or taken in the retinue of a prince or a king. Thus we find that the sib or kinship group played an important part in the early German society.

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1. Similar with Vedic Wer-geld.
2. Munroe Smith: "The Development of European Law", p. 50.
3. Similar with the ancient Romans and other Indo-Europeans.
4. Analogous to separated members in Hindu Law.
5. Similar is the case of Hindu adoption.

As regards the degree of blood-relationship in the sib system, there were stable and unstable sibs, *i.e.*, narrower and wider circle of kindred. In the earliest time as elsewhere, the sib was a solitary agnatic union. Those who were descended from a common ancestor in male line were 'blood-friends' on account of common descent. No other kinship, through wives and mothers was recognized. With the introduction of exogamy, *i.e.*, marrying outside the sib, the woman became absolutely separated from the sibs of their kindred. But the matter became more complicated when the maternal kindred got legal recognition. According to Huebner this was the case in Germany from the beginning of historical time onward.[6] From this time on, the children became the members of the paternal and maternal sibs. From this phenomenon it is manifest that the kindred sibs were coalescing into bigger related groups. In this, the sib of the wife became the sib of the mother in the next generation. This created a division in the old stable agnatic marriage relation.[7] Hence descent from a common male ancestor was no longer alone a decisive factor. The conclusive factor was the descent from a particular pair of parents. "With this step," says Huebner, "the concept of blood-relationship in the broader sense, inclusive both of agnates and cognates, replaced the older and narrower concept which had so long been designated as the agnatic relative only, the 'unstable' (wechselnde) sib replaced the solid or 'stable" (feste) sib.[8]

Now from a comparative study of the law of property, it is found that the individual right in movable property arose earlier than the individual right in land. Hence, we find in early German law that the succession to movable property is assured. In the case of death, this succession devolves not only to direct descendants, but it establishes a right in favour of the collaterals. Thus the succession to movable property is confined among the sib. We find that as early as the time of Tacitus, the household, the adjoining barn, etc., with the fenced enclosure was in private seizin.

6-8. Huebner: Op. cit., pp. 713-714.
7. Vinogradoff: "Geschichte und Verwandschaft in alt norwegischen Recht.", in Z. 50, W. G. III, 1898, p. 42.

It was only arable land that used to be periodically assigned for cultivation. What was not arable land became the pasture. (Germania. C. 26). But with the predominance of agriculture over pasturage, permanent control of agricultural land appeared and separate seizin developed[9]. But when laws were written down all the usages narrated by Cæsar and Tacitus had disappeared. Though in many cases the sibs possessed tracts of land, household ownership in house and lot and also of arable land seemed to have been common.[10]

Thus, so far we see that in the nomadic period, a tribe owned the land it occupied; then the arable land was distributed periodically according to the number of cultivators. Finally, with the development of agriculture, interest in permanent control of arable land developed. Hence, from the tribal collectivism of arable land, the family collectivism of household goods and arable land developed. Again, the thing noticeable here is that two kinds of property arose, movable and immovable, each having its own law to determine its right. Further, the individual right to movable property evolved first. It is the natural sequence of nomadic tribal usage.

Coming to the rights of succession to land, it is seen that succession to land was limited to males only.[11] The earliest texts of the Salic law of the Franks say that the land goes to the sons, in default to the community.[12] The later texts speak of right of succession to the brothers, and later to the male collaterals. But this development antedates the establishment of feudal tenure system. Further noticeable thing in this is that in these earlier German laws there is no trace of primogeniture.[13]

Thus the kinship in the early stage used to be counted through the males. The kinship and succession to property were strictly agnatic. But Smith says, "In some of the earlier German laws kinship seems to be reckoned through the female as well as the male line. This cannot have been originally the case".[14] An English investigator says that in the time of Caesar and Tacitus

9-10. Vide Munroe Smith: Pp. 58-60.
11-13. Vide M. Smith, p. 60.
12. Analogous with Yajnavalkya's legal rule.
14-16. Vide M. Smith: Op. cit., pp. 52, 66.

"the kindreds of the Teutonic tribes were based on agnatic relationship".[15]

As regards the origin of the Germanic law, it was held to be of divine origin. Regarding this, Smith says that the early conversion to Christianity of the West Germans obliterated most of the traces of the original sacred nature of the law.[16]

B. MEDIAEVAL AGE

In the beginning of mediaeval age of Europe, we find the Frankish Germans extending their sway over the greater part of Western Europe. This empire brought Gaul and Germany under one sceptre. In the German part of the empire we find that separate ownership of arable land was in vogue. But in the villages, the old system of communal control of the mode of cultivation still persisted. Yet all through the Middle Ages, Smith says, we find the notion of family right in land expressing itself in case of sale and even a right of repurchase within a term of years.[17]

Thus, this period was a stage of transition, individual ownership in cultivable land as well as a communal control of cultivation existed side by side. Yet during this period there was a steady rise of inequality of possession in the German part of the empire. All land that was not within the limits of the village or in possession of the individuals, belonged to the King. Even the dukes of many of the tribes possessed large tracts of land. The church even became possessor of great tracts of land. Large estates were being formed. Thus all sorts of collectivism in land were being things of the past, land was getting concentrated in the hands of the rulers.[18]

The introduction of Christianity among the Germanic tribes by the Frankish emperor Charlemagne, ushered in the influence of Roman legal system in Germany. Sohm says, "Mediaeval law was not to be found in the books. It lived entirely in the memories of men. A science of law was, therefore, a thing unknown in

15. "The Cambridge Mediæval History", Vol. II, p. 631.
17. M. Smith: P. 107.
18. Compare the fate of land in India in the Brahmanic period of the Vedic age and in post-Vedic age.

Germany".[19] Thus we find that ancient and mediaeval laws of Germany were tribal and customary and of indigenous growth.

C. FEUDAL AGE

Then developed the full-fledged Feudalism. In this age, "practical ownership consists of a life-interest, inalienable in most cases and of a reversion or remainder which again when vested, is simply another life-interest".[20] Thus the "ownership" in this stage is analogous with *svatva* (ownership) theory of Mitakshara which was also a feudal legal system of India and which in its last analysis is a life-interest. Further, the heritable remainder does not go to all the children, nor originally to all the sons. Due to the impact of the feudal tenure with the existing custom, arose the rule of *Primogeniture*. As a corollary, in the matter of succession to servile and to peasant lands, evolved a different custom, the rule of *Ultimogeniture*. The land was inherited by the youngest son. It is analogous with the English custom of "borough English,"

The mediaeval jurists of Germany divided property which is a 'thing' (*sache*) as a corporal thing.[21] Then they divided the rights attached to corporal things as *'real'* rights and *'personal'* rights. These divisions are based on Roman Law, and it exists in modern European law. Further, they divided corporal things into 'movable' and 'immovable' varieties. Hence two sets of law, one for movables, another for immovables were evolved. Again, besides the law of land, there was an independent law of chattels.[22]

As regards the concept of ownership, it was the fullest right that one can have in a thing,[23] which was known from the earliest times. But it was not sharply defined in the mediaeval land laws though individual ownership in house and homestead had been

19. Sohm: Op.-cit., Introduction, p. 2.
20. M. Smith: Op. cit., P. 172.
21. R. Huebner: "A History of Germanic Private Law", pp. 160-161. (English translation by F. S. Philbrick).
22. Cosack: "Lehrbuch des deutschen buergerlichen Rechts", 3rd. Ed. 1900, p. 136.
23. Brunner: "Grund Zuege", 5th Ed. p. 197.

known from the earliest times; but it was applied to the arable land after the tribal migrations, while 'allmende' *i.e.*, the old collective ownership had been dissolved in recent time.[24] By 'Allmende' was meant not only a property but for the use of all.[25]

The peculiarity of the land holding-relations of the mediaeval period was the rise of *hierarchical* ownership. It was then becoming the rule to distribute the produce of the land among several persons which gave rise to the peculiar conception of the right of property as a form of physical dominion. This led to the conception of ownership as partitioned out among various persons whose rights were of varying strength. Thus the owners were not equals but were arranged in a hierarchy.[26]

As an after-effect of the earlier collective ownership of the soil, there lingered in mediaeval law, side by side, with the development of individual ownership in land, the idea of collective rights in the soil inherent, at the same time and in the same degree, in various forms. The important of these forms are: (1) 'Ownership in collective Hand'. In its pure form it is explained thus: In all personal groups controlled by the principle of 'Collective Hand' there existed a collective right of group members..... It found characteristic expression in two rules: The one was that no one of the co-owners could dispose by himself alone, of either the whole or any part of the common property, whether by act *inter vivos* or upon death. On the contrary, only all the co-owners acting together 'as with one hand' could dispose of the whole or of a part. And although the right of the individual might be regarded at the same time as his share or quota in the collective property.....nevertheless he enjoyed no dispositive power over such share, but was absolutely bound in relation to it by the members.....only the bond that joined the members into a legal group disappeared, could the idea of shares, till then inactive and inconspicuous ,became effective".[27] Then the "co-

24. Huebner: Op. cit., p. 227.
25. O. Gierke: "Das deutsche Genosseuschaft", Bd. I, p. 67.
26. Vide Huebner: P. 232.
27. Vide Gierke: "Genossenschaftsrecht", 11, 928.

owner who abandoned the group had a claim to a quota corresponding to his co-right which had until then been undifferentiated".[28] This rule of community ownership sounds very similar to the Mitakshara joint-family system with the difference that in the German system it is a law dealing with ownership in co-operative cultivation, while in Mitakshara, the law deals with the ownership of family property.

Another characteristic rule of this kind of ownership was, that the estate of the dissident member was not lost to the community, but accrued to the other commoners, with the exception that lawful share of the inheritance was allowed to the children of the dead member, who were received into the community in place of their father and received their father's quota. "With this exception survivorship[29] took place in favour of the remaining commoners who continued by themselves the collective hand relationship".[30]

(2) The other form was the ordinary collective ownership. In this form of community ownership, the collective ownership developed in the *sib* and especially in agrarian associations. This form of ownership had its older and younger forms.[31]

These different forms of community ownership were confined among the agricultural co-operative hands. The laws about ownership dealt with collective farms and not family property. But there is a striking similarity with Mitakshara law of property rights. As Mitakshara succession is limited to the sib, it is in principle a community ownership. Then the immovable properties are owned collectively by the community i.e. family governed by the Mitakshara law.

As regards capacity for rights in old German Law, it did not recognize any right unless birth took place. But certain provisions in Frankish law would seem to indicate that originally the child in the womb had capacity for rights in property.[32] Later on, the German Law extended this right especially to paternal

28-31. Huebner: pp. 235-238.

32. Coutex: "Der Nasciturus, Ein Beitrog Zur Lehre vom Rechtssubjekt in Frankischen Recht", in Z. R. XXXI, 1910. Quoted by Huebner, pp. 42-43.

property in case the child was born alive. On the other hand, the Prussian Law said, "The natural rights of men inure even to children not yet born, from the moment of their conception".[33] Thus we find here echo of the theory of ownership by birth advocated by Yajnavalkya-Vijnanesvara school of Hindu Law. Further, regarding the law of inheritance, Huebner[34] finally says thus, "However obscure and controversial may be the beginning and the oldest rules of Germanic law of inheritance, it seems nevertheless permissible to assume that the historical source of the Germanic, and therefore the German law of inheritance was the original collective ownership of the kindred ; a source of which the later law never lost consciousness. For the Germanic law of inheritance, in its essence, has always remained primarily a law of blood inheritance, of family law.[35] This family law, however, developed only gradually into a law of inheritance.[36] The origin and development of this branch of the law were closely and necessarily associated with the origin and development of private property. Therefore rights of inheritance in chattels became possible earlier than rights of inheritance in lands. So long as all property, aside from the few objects of personal use such as weapons and clothes that were buried with their owner,[37] remained in the collective ownership of the sib group, the individual members of this as that of the heads of its households (Haus Vaeter) receiving a mere right of usufruct in the lands and chattels (the cattle and agricultural implements) of the sib, the latter's collective ownership was unaffected by the death of any individual member. This is the first stage of development of property in chattels. Later, the chattels passed from the sib's collective ownership into the ownership of its individual members.....they became the collective property of the family." Thus, the property in chattel passed to the secondary stage of joint-interest of the family.

33. "Prussian Landrecht", V. 1. ffl. Quoted by Huebner, pp. 42-43.
34. Huebner: Op. cit., pp. 694-696.
35. Analogous with Mitakshara of II, 122.
36. Similarly this kind of family law might be the origin of Yajnavalkya's aphorism.
37. Vide the Vedic 'prayogas of burial'.

As regards the composition of the family, as mentioned before, it was a patriarchal one. The houselord and his heirs lived unitedly under his household authority. This means, as regards the household estate, that the father and the sons forming a property community. In this relation the family was the representative of the community and as such was given a primary right, also above all the usufruct of the household property. But the sons were recognized as co-holders of rights with the father, and were given an irrevocable right of succession. After father's demise the sons stepped into his shoes which was no change of right but simply the expression in form and fact of what was already latent in them.[38] Thus "the restraint upon the alienation of the sequestered estate was now transformed into a rule of succession".[39] Hence the sons could thenceforth partition the family estate among themselves or hold it in common as owners in "collective hand".[40] Thus, within the family originally there was no question of rights of inheritance but merely a "collective succession" in the collective property. In the case of the demise of a son during the life-time of the father or after his death, while all living in the continuous family community, the question of benefit of survivorship was involved.[41] In all these rules of the German Law during its secondary stage of evolution we clearly discern the similarity with the principles of Mitakshara succession to grand-father's property and the Mitakshara joint-family rules. The question of survivorship like Mitakshara arises in German Law as well.

In analysing the evolution of mediaeval German legal system, we find that in the beginning the household property belonged to the sib. This is evinced by the fact that if a man capable of holding ownership in collective hand be not living, the household property reverted to the sib. But when the sib ceased to be a holder of collective rights either in respect to all property or at least to movables, there arose the necessity of the strict

38. Vide Huebner: Op. cit., pp. 694-696.
39. Huber: "Schw. Privat recht." IV. 541 Quoted by Huebner. pp. 694-696.
40. Huebner: Op. cit. pp. 694-696.
41. Heusler: "Institutionera" II. p. 528.

law of inheritance. Later on, a similar development took place in the case of lands, as these passing into the ownership of sib families become the most important part of the household property. Thus, first the movables and latterly the immovables became the household properties. This is the third stage of evolution of property. But as succession had been within the sib from the beginning, *i.e.*, agnatic, it led to a differentiation of 'narrower' and 'wider' circles of heirs. In this matter, the analogy with the Indo-Aryan 'Sakulya' and 'Samanodaka' was discernible. This also, as has been seen before, is the case with the ancient Romans. Thus the German Law of Inheritance was based on blood-relationship. There, in the beginning was no voluntary succession of inheritance but only a customary succession. Huebner admits that it was in consonance with the views of a primitive and unindividualistic society. Moreover, he says, it was identical with the original institutions of other Indo-Germanic races.

Latter-day development gave rise to the necessity of a *will*, a voluntary testament for succession. The Indo-Europeans *viz.*, the Indo-Aryans, the Greeks and the Romans along with the other Germanic races originally had no system of making a will to ensure succession. It was created to meet the emergency of a special case. Generally, intestate succession based on blood-relationship remained the rule. This is again analogous with the Hindu system of law amongst whom the British first introduced the principle of making a will, though as admitted by Sir Henry Maine, it existed in Bengal in a rudimentary form since long time.

Then from the sixteenth century onward came the spirit of revival of the antiquity in Germany. The new movement of Renaissance affected German Law as well. Roman Law was definitely received in Germany. It was called the "Reception." Thus it set an interaction between the received Roman Law and the autochthonous German Law. As the mediaeval German Law was not a written law, rather a traditional one, Roman Jurisprudence as contained in the "Jus Gentium" of Justinian filled up the vacant place. This interaction gave rise to the German Jurisprudence. As a result, the Roman private law became the com-

mon private law of Germany. It came to be known as the 'Law of the Pandects' from the principal portion of the Justinian Law. Yet the law of Pandects did not uproot the local laws of particular territories or cities. But from the eighteenth century onwards came a revival of the German private law of indigenous origin. At the same time the legislatures of different States began to legislate on single topics. From this bizarre systems of laws arose the necessity of recasting and codifying the German Law. At last with the establishment of the new German Empire by the genius of Bismarck, a commission was called into existence in 1896 A.D. to codify the German Law into one German Civil Code. It came into force in 1900. Thus the evolution of German Law was completed after four hundred years. The Roman Law was abolished. The new code did not re-introduce mediaeval German Law. It produced a modern German Law.

D. MODERN AGE

According to the older law, succession by one heir was unknown. The heritage passed to the co-heirs collectively. They were the the successors by collective right. This resulted in a community of collective hand between the co-heirs. In accordance with this principle, each co-heir had a share in the collective estate which he could not dispose of alone, but could demand a severance of the same in respect of his share at any moment. Here we find that much of it is analogous with Mitakshara joint-family.

In modern Law, the joint-ownership in the collective hand was displaced by the Roman co-ownership. Each heir received a fractional part of the specific things included in the estate. In accordance with the provisions of the new Law individual objects in the estate could be disposed of by all the co-heirs together; but alienation of the entire estate could be made by each co-heir independently according to the quota principle, to the extent of his share. This sounds like Dayabhaga rule of the right of alienation of a co-heir in his share of ancestral joint-property. But there lies a difference. In the modern German Law the right of alienation by a co-heir is restricted by his co-heirs'

rights of pre-emption. The new civil code has followed in general the Prussian Law, thus giving validity to the old German Law which said : "So soon as the owner is dead, the heritage passes by force of law to the heir (§ 1942), and the possession also passed to him without further formalities, and without regard to the question whether or not the heir possesses any actual control over things" (§ 857).[42]

The fundamentals of the modern German code is like the French code enacted under Napoleon the First. Property and liberty had retained the same position in the code of Wilhelm II as in the code of Napoleon I.[43] Here, a word must be said regarding the order of succession to inheritance in the new Law. We have seen that the earlier rule of succession was by agnation. But in the Middle Ages, the 'Parentelic' system of succession was widely prevalent. Recent investigators say that it was an early and widespread system.[44] According to this system, the kindred of any individual member of the sib (the 'propositus') was organized in distinct groups in this order: his own descendants, the descendants of his parents, of his grand-parents, and so on. His own children, grand-children, great-grand-children, etc., formed in relation to himself the *first* parentalic group, as he was the male ancestor of all of them. Then the children of his parents, *i.e.*, his brothers and sisters and their descendants, his nephews and nieces, grand-nephews and grand-nieces—all these constituted the *second* parentalic group. The other descendants of his grand-father, *i.e.*, his uncles and aunts, his male and female cousins, and their children and grand-children and so on, were the *third* parentalic group. In this way, the enumeration went on in ascendant line. Thus the degree of kinship was reckoned from the lesser or greater distant from the truncal head or the truncal pair of that group of Parentela.[45] The word *Parentela,* according to modern legal science means 'trunks', 'lines'. This organization of 'blood-friends' spreading out into

42. Huebner: Op. cit. p. 704.
43. A. Alvarez: "The Progress of Continental law in the Nineteenth Century" 1918. Ch. V. p. 280.
44. Huebner: Op. cit. pp. 724-725.
45. Huebner: Op. cit. p. 17.

successive layers above and below the 'propositus' is confined, of course, within the agnatic group. All of them were related through a common male ancestor. Noteworthy in this system is that the sisters are not excluded in the parentalic organization. They like the agnates have got the right of heirship. This means, the sisters do not go out of the sib. It has got a wide range of blood-relations. The modern code has given the parentalic system the authority of common German Law though not with the same authority as in the Austrian Civil Code. In both these cases, succession takes place according to stocks.

Thus the peculiarity of the German system of succession is the Parentalic system. Though principally it is an agnatic order of succession, yet it does not exclude the daughters from inheritance like other agnatic systems. But in our review of the statements of different investigators we have found that there are disputes on the issue in question. Huebner admits that the prevailing theory is, that the original Germanic society being a patriarchal one, the law denied to women the capacity to hold property, hence to inherit.[46] But he says that by the beginning of historical times this rule has been weakened "to a mere preferment of males and 'male kindred' in the inheritance law." And the right of parental reversion (Fall recht) that was developed in many mediaeval systems especially in the Frankish, Swiss and Prussian Laws was the echo of the fact that at a late date the rights of the kindred related through the mother were recognized in the inheritance law.[47] This betrays the fact of the unions of the father and the mother sibs at that stage of development. We have referred to Huebner's statement here before. Thus originally there was a sex-discrimination. The succession was confined only among the agnatic members of the sib. But in the historical period of development when the sibs were coalescing and Germanic nations were in the process of formation, the cognates related through the mother began to be taken in the order of succession.

46. Huebner: Op. cit. p. 729.
47. Huebner: Op. cit. p. 729.

VI

THE DEVELOPMENT IN THE NINETEENTH CENTURY

(i) The Continent.

The latter part of the eighteenth century saw the episode of the French Revolution and the establishment of a new order of society in the name of liberty and individualism. It ushered in the epoch that synchronized with the close of the feudal order of society and the rise of nationalism. This phenomenon had its repurcussions on other parts of Europe, and national States began to be formed in the continent. With the formation of national States, national laws began to be developed in the nineteenth century. The first of its kind is the famous *Code Napoleon.* In this code framed at the time when rationalism was in ascendance, attention was given not to fetter the free action of the individual. Thus the law was framed on individualistic principles, hence the law of private property became individualistic. The important features of this code is that (1) Statutory law is to be the sole rule governing legal relationships, (2) the law is to be the same for all. The new law proclaimed that it provides "the right of ownership to be absolute, exclusive, and perpetual." The Article 544 of the code says : "Property is the right of enjoying an object in the most absolute manner, etc." The acquirer of the land is its absolute owner. As regards the law of inheritance it is regulated in view of the interest of the individual. As regards family lands, "it was based upon the idea of solidarity of members of one and the same family by reason of the sentiments of affection uniting him." Thus as the French Revolution brushed aside all the institutions of Feudalism, the Code Napoleon ushered in a new era of individual liberty in law. It unfettered the individual's action. The new Civil Code "liberated man and his law."[1] When the French

1. A. Alvarez in "The Progress of Continental Law in the Nineteenth Century." 1918. pp. 1-21.

Code is compared with the new German Code of Wilhelm II, no fundamental difference in principle is to be found. The distinct characters of both the codes are property and liberty.

As regards the new Swiss Code, "it recognizes the disadvantages that arises from conferring a right of succession upon very distant relatives."[2] It gives the liberty to a person to dispose of his property by will, combining with it the principle of the compulsory reserve for the heirs. It classes brothers and sisters among the heirs sharing in the reserve (Civil C. Arts. 471, 472). Again, "the ownership of a thing has the right to do with it as he pleases, within the limits set by the law." (Art. 635).

Now let us come to the Italian Civil Code of 1868. It is said by the foreign students of law that the new Italian Civil Code is superior in many respects to the French and other European Codes. In this Code,[3] "the general principle of ownership in common and of possession have been logically formulated." Again,, "the latest conclusions of the philosophy of civil law have found adoption and the requirements of modern civilization have been put in same level in law.....The right to disinherit has been denied.....The right to leave by will has been reconciled with the claims of the family, by reducing the prescribed portions of the testator.....The right to inherit, or of the right over the indispensable portion, has been extended to such persons as the deceased may be presumed to have intended to help, towards whom he owned binding and moral duties. In this way, the interests of the natural child have been protected."

Again, the principle of representation has been introduced into the matter of testamentary succession and also to establish equality among the heirs. Further, all distinction between normal and privileged inheritance has been done away with, as also all differences of succession according to the source of the property which may be either purchased or inherited, maternal or paternal kind.[4] Also, primogeniture, *i.e.*, every preference to the first-born or

2. Vide "Message" p. 49.
3. Icilio Vanni: "The Italian Civil Code of 1868 in Ch. VIII. 1906 in "The Progress of Continental Law in the Nineteenth Century."
4. Vide Vanni: Op. cit.

the male sex has been abandoned, and the trust-entail has been abolished. In this way, all obstacles to the free circulation of property have been removed, and the way has been opened for the distribution of ownership. Finally, Vanni says, "whether for its liberal spirit or for a merit which we might call doctrinal or scientific, the Italian Civil Code may be considered to-day as the best legislation upon private law in Europe".[5]

(ii) England

Now let us come to the English Law. The English Law has got its basis in the common law of the Anglo-Saxons brought from North Germany. This again, has passed through various phases of transition and growth and later modified by the Norman conquest and by the introduction of Feudalism by the Normans. Finally it took the form of Judge-made law during the latter half of the twelfth and the whole of the thirteenth centuries. The investigators say that prior to the Norman conquest there had developed a system of land-holding which was practically feudal in every respect. It is found that the important principles of private law had fully developed or were in the process of development prior to the Norman conquest. Thus, disposition of property, real or personal, by will, absolute ownership of land with inheritance, estate for life, dower, had been developed in the Anglo-Saxon period.[6] Again, "title to personal property, transfer of title by sale and barter and disposition of personality by will were fully recognized".[7]

As regards succession to inheritance during the Anglo-Saxon period, one must refer to Tacitus (Germania ch. 20) that on the death of the owner, the order of succession fell on his kinsmen. The English investigators say that "there is no evidence that anything in the nature of family or clan ownership existed; property belonged to the individual, and, on his death, it was distributed among his kins according to law".[8] Then among the descendants,

5. Vide Vanni: Op. cit.
6-7. W. F. Walsh: "Outlines of the History of English and American Law." 1926 pp. 41-42.
8. Vide Pollock and Maitland: "History of English Law before the time of Edward I" Vol. II. pp. 248-253.

the males took to the exclusion of the females. But in case there were no male successors, the female descendants inherited to the exclusion of the collateral relatives.[9] But not long after the Norman conquest, in the absence of the males of equal degrees, the right of women to inherit was established.[10] Again, during the early part of the Norman rule, the system of Primogeniture was established.

As regards the talk of family-ownership or right by birth as we find in early and mediaeval German laws, the historians Pollock and Maitland say the last word on family ownership in these words : "We would be rash were we to accept 'family ownership', or in other words a strong form of 'birth-right' as an institution which once prevailed among the English in England".[11]

In the matter of law of descent, since the reign of Henry III, the English common law of descent was taking its final form. As regards our subject-matter of investigation, we find that among the descendants of a 'propositus' there is an order of precedence. In this order the males exclude the females ; among the males of equal degree, only the oldest inherits ; females of equal degree inherit jointly as co-heiresses.[12]

Finally comes the English Inheritance Act of 1833 which abolished the anomalous position of the common law which used to exclude the ancestors or descendants.[13] This Act made radical changes in the scheme of succession in the common law. It regulated the order of succession of collaterals and ascendants to an intestate's personal property by the 'gradual' scheme as distinguished from the 'parentalic' scheme.

In tracing in a few words the evolution of English law, we find that it has not followed the development that took place in Germany. We have already said that the land-law is very complicated as it bears impress of Feudalism which was abolished in the continent in the nineteenth century and in France during the great Revolution. England has not adopted any code ; it

9. Hale: Com. Law. Ch. 11.
10-12. Pollock and Maitland: Vol. II. pp. 259-260; 255; 260.
13. Williams: "Real Property". 17th Ed.

is governed by the Statute-laws which hide much of the common or folk laws of the ancient days of England. But there are two other legal institutions which are peculiar to England that smack of co-ownership in some respects, *viz., Joint-tenancy* and *Tenancy-in-common.* The 'Joint-tenancy' arises in the case when two or more persons acquire property jointly by purchase. This acquirement is done in any other way than by inheritance. In this case the right of survivorship arises on account of the fictitious unity which the law creates in this case. The tenants are treated as constituting together as one person, and this fictitious person is regarded as the owner of the property.[14] The 'Tenancy-in-common' arose in common law in cases where one or more of the unities of time, title, or interest were absent. The essential factor of this unity is possession. This system arose where Joint-tenancy was converted into Tenancy-in-common by the alienation of joint-tenant's separate interest by an individual member, and when expressly created as such.[15]

The first of this system is analogous to the law governing Mitakshara family and the second one is analogous to the law governing the Dayabhaga family. It is to be noted here that the second arose out of the first system. There is an economic interpretation to this legal devolution. But these systems are not to be identified with the Joint ownership of family properties which we are looking for in the different legal systems. The Joint-tenancy has got some resemblance with the German mediaeval "collective hand" system which was the law with co-operative cultivation in Germany.

(iii) The United States of America

In the United States of America which was colonized by the Europeans, the law has taken a new course by discarding the old track of the mother country. In this land of plenty the economic condition was different ; hence primogeniture and the preference of males over females were not recognized. All children inherit equally as *tenants-in-common.* In the case of a

14-15. Vide Walsh: Pp. 218-225.

person's children some of whom are living and some are dead, the descendant's of the latter inherit *per stirpes*. In case where there are no lineal descendants, the father and mother take ahead of the brothers and sisters in the matter of inheritance. Again, in some States, the inheritance passes equally to both parents, or to the survivor.

As regards land, it has already descended equally to all the heirs, male and female. This system of equal division had been adopted long before the Revolution, both by colonial statute and by custom. Finally it is to be said that in the United States the law of inheritance is entirely governed by the statutes of different States. Lastly it is noted that many incidents of legal ownership make distinction between real and personal property. Land and anything attached to it so as to be identified as a part of it, is *real* property. All other property is *personal*. As a result of these physical differences, two different sets of rules of law are applied in the case of land and other kinds of property which are not land.[16]

16. W. F. Walsh: Op. cit.

VII

THE BASIS OF LAW

So far we have cursorily made a comparative study of the laws of the peoples outside India, past and present. We have also seen that as regards the ancient historical Indo-European peoples of Europe and Asia, there has been much resemblance in their legal conceptions with the people of ancient India down to the Institute of Manu. Besides, the mediaeval legal institutions of the Germanic peoples resemble the mediaeval legal rules of Yagnavalkya and of his commentator Vijnaneswara. Only the nineteenth century legal conceptions of Europe approached the legal maxim of Jimutavahana. The succession to inheritance after the demise of the owner by his heir, the abolition of the distinction between ancestral and self-acquired property in the matter of ownership, the abolition of movable and immovable nature of property, thus modifying joint-family, the fusion of two kinds of succession: obstructed and unobstruced into one, thus bringing the agnates and the cognates in the order of succession, the change of nature of ownership from joint-tenancy to tenancy-in-common emphasizing individualism and liberty in ownership, are the works of Jimutavahana in the eleventh century A. D. Most of these points have been arrived at by the reformed European laws in the nineteenth century.

But whence comes the split in Indo-Aryan law is the moot question. From the time of Yajnavalkya we find the rise of the theory of "common ownership" in grandfather's property. This is a wedge in the midst of the Indo-Aryan legal system. In the mediaeval period we have already seen that the Smritikaras who arose after Yajnavalkya, were divided in their opinion in this matter. At the time of Vijnaneswara in the eleventh century, there were two schools of law sharply differentiated. From this time on, when the Smritikaras were non-existant *i.e.*, when Smriti-writing went out of vogue, the Nibandhakaras were fol-

lowing in the wake of either of the two schools. Instead of Manu, Devala and Narada on one side and Yajnavalka, Vishnu on the other, we find Vijnaneswara and Jimutavahana jostling against each other and the end of the strife is not yet in sight.

The latest writers on Hindu law have just satisfied themselves by saying that both the systems are ancient and both of them swear by the ancient Smriti-writers. But that is just shelving the question. It is an evasion to find out the root cause. The true cause must be sought out and some day it may come out after a patient investigation. Here, it is to be noticed that Prof. Ghurye has lamented that the eleventh century saw India split-up not only in the matter of costume but also in law.[1]

Law is not the fiat of a person; legal conceptions are not the product of the brain waves of the priesthood. Legal institutions have got their roots in customs. Hence, the roots of legal customs of a given people must be dug out from its ethnology. On this account, J. Kohler, the authority on International Law says, "The law of a people can be interpreted only in the light of its entire culture, which in turn, is to be interpreted, as extending beyond the material economic factors, to include the ethical and religious views that the law reflects. The general view of life influences the law, and from such composite cultural forces the law arose."[2] Then he says, "The origin of primitive law lies in animistic conceptions; but even the primitive beliefs have declined and survive only in superstitions, the law retains its religious tenor." Further, his conception of the origin of law is, that "the process of the formation of the law can be understood only as part of the general development of the people. The philosophy of law must be set forth how at every stage of development definite legal institutions have embodied the cultural ideals then maintained."[3] Thus law is of ethnic growth and is the cultural expression of the ethnic group. Then we come to the folk-psychologist Wundt. According to him the origin of law is an issue of the

1. Ghurye: "Indian Costume".
2. J. Kohler: "Zur Ethnologische Jurisprudenz": Z. S. V. Rechts, Vol. VI. p. 407.
3. J. Kholer: "Recht, Glaube und Sitte", pp. 564, 611; 'Enzyklopædia' §§ 8, p. 14.

psychology of races. Thus he says, "Like language, myth and custom, law is not the issue of an arbitrary consensus, but is a natural product of consciousness firmly rooted in the emotions and desire arising from the communal life of man." In pursuance of it, he gives the following definition of law as, "the aggregate of privileges and duties which the superior will of a community acknowledges as incumbent upon the individual members of such community and upon itself."[4]

Again, Sri Bose, an Indian writer on juristic psychology says, "From the psychological standpoint, the essence of law is its actual recognition by the mind as law. 'Recognition as law' is the work of legal consciousness." And, "Legal consciousness is the psychological origin of law."[5]

Thus, so far we have arrived at the idea that law is of ethnic development and is the product of the consciousness of the *mores* of the community to be acknowledged as incumbent on it for its regulations.

Lastly, Dr. Diamond has made an anthropological investigation into the origin of primitive law and has made a comparative study of the ancient and mediaeval laws of the past and present peoples. In his investigation he has arrived at a diametrically opposite conclusion from that arrived at by Sir Henry Maine in his "Ancient Law." Regarding this book Diamond says, "There is no substance in any one of these conclusions: indeed the contrary can be clearly demonstrated by evidence."[6] Diamond in his investigation has divided the codes into different layers, and the interactions that have led to the formation of these strata. Here we shall confine ourselves to his observations on Indian Law. Thus he says, "The code of Manu is a farther instance of the same succession of events in the history of ethical thought, and indeed lawyers who are acquainted with that compilation have for a long time been agreed that it originated in rules of true law."[7] "The proto-type of the code originated among Aryan invaders of India before the rise of the Brahmanism. It was a

4. W. Wundt: "Logik" 2nd ed., vol. II, pt. II, pp. 533—561.
5. Probodh Chandra Bose: "Introduction to Juristic Psychology", 1917, p. 365.

brief code of secular laws of some Indian kingdom, and the king, it plainly appears, was both ruler and supreme judge (see chap. VIII & IX of the code). When a speculative interest in rules of conduct arose, and Brahmanism began to appear, the codes in the hands of the Brahman sages and teachers, were developed and extended by the addition of further rules of conduct, until it became a Brahmanical text book—a book containing the rules whereby a Brahman should govern his life in all its activities."[8] "The general legal institutions of the code of Manu are found in many parts of the world at a certain stage of development and are not special with Brahmanism."[9] The similarity between Manu and other ancient legal systems has already been noticed by other investigators as referred to above.

Then he divides the codes into different layers of which the *earliest* ones were statutory legislation on a few isolated matters, issued by rulers and recorded in writing and not orally (*vide* codes of Hammurabi and of Assyria, Hittites, etc.) "The contexts of the Early codes show no (or almost no) ecclesiastical bias."[9] Then comes the period of *Middle* codes, "The priestly order—now a distinct and organised profession—gain a position of great influence and material strength in the State.....The priests have built up a great body of religious law.....When we reach the *Late Middle* codes, we find that the ecclesiastical order has obtained the exclusive jurisdiction in these matters."[10] Then, "That result of the professional outlook and professional interest of the priests in legal matters is that the Middle codes contain, besides old statutory legislation, a number of what may be called a priestly rule. These are rules which the priest desired to see in force dressed in the guise of old legislation, and they include chiefly rules of conduct embodying religious doctrine and rules tending to the material benefit of the church".[11]

Dr. Diamond has made his investigations mostly from European history, but as we find it, it holds good in the development of the Hindu law as well. Then he traces the origin of the right of succession in inheritance. Regarding it he says, "In

6-8. A. S. Diamond: "Primitive Law", pp. 2; 127, 2nd. ed., 1950.
9-11. Diamond: Op.-cit., p. 248.

short, the earliest rules of inheritance arises simply from the fact that the property of the group remains in the group." This we see all through, that the property of the family remains with the gotras, *i.e.*, the members of the sib. This takes place when patrilineal descent, like patrilineal marriage, spreads in the latter stages of primitive law and also in the third Agricultural and second Pastoral grades where it is far more common. Then tracing the development of succession further, he comes to the stage when a new line of development takes place. This he traces as early as in the code of Hammurabi when "trade has vastly increased, the population is more mobile, and a concentration towards the cities now begins. The clan disappears, and a narrow family members are the husband and wife and their children of both sexes; nor is there any reason why the daughter should be excluded on marriage more than the son, for the rule under which the married pair takes their home with either the husband's family or the wife's begins to disappear. This new constitution of society inevitably colours and moulds family relationship, and we see a movement towards a fourth type of succession.....The basic unit of inheritance becomes the 'cognatic' not the 'agnatic' family of the nature of Roman law."[12] This conclusion has been arrived at by all the investigators in the anthropological field. When the sib system is weakened, the daughters begin to get a right to inherit their parental property. Thus we are in safe anchor regarding the phenomenon of inheritance by the cognates.

As regards the evolution of property, the primitive law according to Diamond has got no such conception as ownership. But we have seen already that in the Rig Veda there is a strong sense of property and ownership. Hence, the Rig Vedic age is a far advanced age than the age talked of by the author. Then as regards the devolution of private property he gives the illustrations of various forms of proprietary rights. Finally he says, "In detail, as distinct from this broad survey, it is natural to find enormous variety in the law betweeen one type of property and another. In place, for example, where land in general is the

12. Diamond: Op.-cit., p. 248.

subject of family ownership, we may find individual ownership of trees and crops, which may be freely bought and sold..... Again, we can see changes taking place in this or that detail of the law of certain tribes: at Otna, for example, in Nigeria, oil palms which were formerly always private property have become communal. But we find no evidence here, of any general change from communal to individual property.....there are savage peoples among whom individual property in land is so widespread that all land except the common pathways is the subject of individual rights (The Torres Strait Islanders are such a case)."[13] Summing up Diamond says, "The conclusions arrived at in this chapter are opposed to the prevalent theory upon this topic, which was popularized by Maine." Further he says, "The industry and research of Baden Powell paint a picture which supports at every point the views expressed in this chapter."[14] Here we find that a British Lawyer Diamond in his quest for anthropological basis of primitive law has arrived at the same conclusion as the American anthropologist Lowie, both of whom contradict the theory of evolution of property expounded by Morgan and Henry Maine. Civilization had not progressed in stereotyped grades of evolutionary process, there had been zig zag ways in the onward march of man's efforts to reach higher planes of existence. Hence, the key to India's march to civilization as expressed through the ancient law is not to be found in Morgan and Maine's hypotheses. India had her own evolutionary process originating in the dialectical process of her history.

Bases of Indian Mediaeval Laws

So far we have traced India's development in legal theories we have found that since the days of the Rigveda the sense of private property had prevailed. But with the repeated invasions of the Hellenistic peoples, the Scythians, the Parthians, the Kuisans, the Huns, there had been a kaleidoscopic change in the structure of the Indian society. All these races have settled down

13, 14. Diamond: Op.-cit., pp. 275-276; vide also Hobhouse, Wheeler and Ginsberg: "The Material Cultures and Social Institutions of the Simpler Peoples".

within the border of what was once India of the Mauryan epoch. All of them had accepted some form of Indian religion, and finally have been assimilated in the masses of India. In Central India we find the Kshatraps who were either of Parthian or of Scythian descent accepting Brahmanism and adopting Indo-Aryan names. They also intermarried with the Satavahanas the Brahman royal dynasty of the South. Again, after the extinction of this dynasty, the legend of sacrifice at Mount Abu by the Brahmans for the preservation of Brahmanism took its birth. This legend says that out of this sacrificial pit arose the Agnikula Rajputs who became the champions of orthodoxy. That there was such a legend is attested by epigraphic records. The question now is, what do these social phenomena signify?

From the standpoint of historical Dialectical Materialism it speaks a good deal about the *Damacrung* period of this age. We can discern the footprints of Indian history in this twilight period. The repeated foreign invasions had made India topsy-turvy. There had been a fall in the curve of India's cultural history. The antitheses engendered by the repeated invasions of barbarous hordes had destroyed the normal advancement of Indo-Aryan cultural line. But India, with her wonted power of synthesis, was again trying to heal the dialectical change. A new synthesis was made. In this age, we find the Central Indian Vakatakas, the Bharasivas, and the Guptas appearing as the champions of orthodoxy. In this age, the Mimamsa-Darshana, the Vedanta-Darshana were written and the Epics and the Puranas got their latest recensions. Thus a new world-view was given to the Indo-Aryan masses. The footfalls of a new synthetized India was to be seen coming out of this dialectical process of historical materialism. Hence, it is not a wonder that some of the manners, social and legal customs of the foreign races absorbed in the Hindu society have been entwined in the new synthesis. The historians have not yet completely appraised how much culturally we owe to the Scythians whose rule once spread over the greater part of the North, the West and Central India. It is now settled that the Hindus got their official dress of Châpkan, Chogâ and trousers from the Scythians, as well as the practice of *Suttee.*

As a cultural gift of the Hinduized Scythians, we may count the theory of "common ownership" in ancestral land and Vijnaneswara's theory of "right by birth" as emanating from the custom of the Scythian rulers. It is their legal rule, like some of their other customs percolating among the masses became a part of the *mores* of the Indian people of some sections of the country. Hence, it necessitated the legislators of that period like Yajnavalkya and Vishnu to give an official sanction to it in their *smritis* and latter-day annotators like Viswarupa and Vijnaneswara to embody it in Hindu jurisprudence. The fact that from the late mediaeval period, the jurists of Hindu law were divided among themselves, prove that this theories of Yagnavalkya and Vishnu did not get a universal application. *Manu smriti* was the final authority and every scholiast had to accept it. It is clearly stated by Vrihaspati that "a *smriti* that is in conflict with Manu is not esteemed" (quoted by Apararka on Yaj. II. 2 and by Kulluka on Manu 1. 1.). On this account, we can safely say that these theories of law are not Indo-Aryan in origin but are latter-day accretions of dialectical antitheses of the twilight period.

Now let us again see what does Yajnavalkya say: "Grandfather's land, corody and chattel are of equal ownership both to the father and the son" (II. 122). This dictum of common ownership hides in it the future right by birth of Mitakshara text. But so far we have not seen any trace of such a statement in previous texts of *vyavahara*. Here, let us find out the meaning of the aphorism: In land of grandfather, the father and the son have equality. This means they have equal rights. This can be construed as the future right of the son to his father's land by birth. Such a rule we have already found in the old Prussian landright, and in mediaeval German land. Hence, the question that arises here is, whence this novel theory took its birth. The older texts do not speak about it. But in the text of Yajnavalkya which is written in the feudal period of Indian history we find its appearance. In the epigraphic records of the feudal period we find the kings donating lands to the Brahmans as fiefs, benefices, immunities, *sthala-vrittis* and gifts. Then there was sub-infeudation of lands resulting in hierarchy of

tenure-holders. The grantees of the lands hold it permanently in their family. Naturally the gift becomes the property of the family, and in course of time the custom may arise that nobody can alienate this immovable property.

Then comes the item called corody, *i.e.*, periodic grants-in-aid. In the mediaeval period we find kings and people donating *vithis* (*vrittis*) to the temples (*vide* Ep. Ind. Vol. I. No. XXI) and to the Brahmans or priests (*vide* Ep. Ind. Vol. I. No. XXIII). As regards joint ownership in grandfather's land we find the Scythian Ushavadatta donating sixteen villages to the gods and the Brahmans (Ep. Ind. Nasik. Ins. No. 8). We see in a Valabhi grant of Dhrubasena III (653-54 A.D.) the record says thus: (Ll 41) "He being in good health issues (the following) command to all.....I gave with a libation of water to the Brahman Bhattibhata, the son of Buppa.....as a meritorious gift, with the Udranga, Uparika and Bhirtavata Pratyaya, with the income in grain and in gold,.....with (the right to) eventual forced labour,.....to be enjoyed by his sons, grandsons, and (further) descendants.....wherefore, nobody shall cause obstruction to him if he enjoys (this village), cultivates it, causes it to be cultivated or assigns it (to others) according to the usual rule relating to *agraharas* which are given to Brahmans". Similarly, we find Maharaja Hastin endowing a village to the Brahmans (C. I. I. Vol. III. No. 21). Thus here are illustrations of grants of immovable property given in perpetuity to the family of the grantee. As regards corody we find endowments to the Brahmans given in various ways. Thus we find in the copper plate inscriptions of the Reddies the following: It records the grant of a village as a *Sarv-agrahara* to a Brahman. "Besides this, the donee was granted a fourth portion of the produce of the wet lands, betel-leaf gardens and sugar cornfields of each of the five villages.....and a sixteenth portion of the produce of the remaining three-fourths. A fifth part of the money income (Suvarn-âdâya) (of these villages) and the water of the Pedda-chernvu (big tank) were to be given to him. Over and above them the donee was to receive one-tenth of the produce of the other villages in the division, and the land at the rate of 200 kunta measured by a pole of 16 barn in big villages and 100 kunta in

small villages." (Ep. Ind. Vol. XXI. Appendix. No. 41). Further, it is still the custom with rich persons to grant a periodic donation either in cash or in kind to the Brahmans. It is a payment gift in instalment.

Then we come to Yajnavalkya's *dravyam, i.e.,* goods. This term means movable property. The gifts recorded in the above-mentioned inscriptions cover this term. The movable and immovable goods are both implied in the various donations. The translator of Mitakshara, Mr. Colebrooke has translated it as chattels, while Jimutavahana and his school seeing the word *dravyam* used in connection with *bhu* (land) take it as *dâsa, i.e.,* slave or serf. Slavery existed in India in various forms. Kautilya's attempt to prohibit it failed by the latterday Brahmanical reaction. We find serfs as *bhakta-dâsa* (serfs who live on their masters) mentioned in the Smriti texts (Yajnavalkya. II. 185). We find illustrations of such serfs in the Prakrit grant of the Pallava King Sivaskanda Varman of Kanchi which reads thus: "We send greetings to our lords of provinces *vatthas* (servants) .....the free holders of various villages, to herdsmen, cowherds.....in Apitti (name of village) (one) *nivartana* (measure of land) poshun given to Brahmans,.....for a threshing floor, (one) *nivartana* for a house, four labourers (*addhika*) receiving half the produce, two *kolikas.*" (Ep. Ind. Vol. I No. 1.). Here, *addhika* appears to have been slaves or rather serfs, and *kolikas* may have been slaves according to the epigraphist. Hence, we can surmise that according to the feudal customs of the age, the land, corody or periodic grant or gift as a stipend and movable goods or chattels *viz.,* slaves or serfs are of common ownership of the family.

Then comes the interpretation of Nirabaddya Uddota. We have mentioned it already. He interprets this formula of "common ownership" as a ruse to protect the fatherless grandson from his uncle's attempt at disinheritance of grandfather's property. The nearness and farness of relationship will not make any difference, as the oblation in *Pârbanna* ritual by both the uncle and the son is equally efficacious to the deceased person. This is the import of the aphorism. Hence, says Jimutavahana, "After the demise of the father and the grandfather, the great

grandson becomes an equal partner in great grandfather's property with his son and grandson; but the acknowledgment of the right of the sons in grandfather's property while the father is living, tantamounts to the acceptance of the separate inheritance of the grandsons in grandfather's property when a sonless brother and a brother with sons divide their father's property. This is contrary to law (*vyavahara*). Hence, the literal meaning (of the aphorism) being not convincing, the meaning is clear when we take it in the sense of equal right of ownership between a fatherless nephew and his uncle" (25). It seems Jimutavahana interprets right of "common ownership" as the right of representation by the son of the predeceased son of the father in his grandfather's property. As regards *Nibandha,* Jimutavahana explains it as a payment given in a particular period of the year or month as a pension or a stipend. As regards dravyam, we have said already that Jimutavahana takes it as a biped as it is connected with land (25). Hence, it is a serf. Srikrishna annotates it as movable goods, servants or slaves (*dâsâs*) when self-earned. Then Jimutavahana quotes Dhareswar or Raja Bhoja of Dhara who interprets the said aphorism of Yajnavalkya thus: when the father willingly divides the property, he has equal right of ownership with his sons in grandfather's property. This means that in the case of partition of his father's property with his sons, he cannot partition it unequally amongst his sons like his self-acquired property. Further, citing Vishnu, Jimutavahana says, "as there is equal right of the father and the son in grandfather's property, the father has got no arbitrary right in his father's property. Hence, by seeing the aphorism about equal ownership in grandfather's wealth some say that the grandfather's property will be partitioned equally between the father and the son; some say that inspite of the disinclination of the father, the partition will take place according to the wish of the son. But both these opinions are to be disregarded. Likewise, the other contrary aphorisms are to be explained" (26).

Coming down to still later days of Muhammedan supremacy, the author of "Saraswati Vilasa" explains the famous aphorism of Yajnavalkya thus: "'Land' means ricefield and the like, 'Nibandha' means right possessed by a minister or other officer

by grant to raise some portion of every article sold in every shop to be paid to him every month or day for his maintenance".[15] Here we get another version of the meaning of the word 'Nibandha'. It is the same as *'abwab'* which is prohibited by law only lately by the late British-Indian Government by the Bengal Tenancy Act of 1934. By the dialectical process of materialism of history, this is the sense that it has acquired in the period of Muhammedan supremacy in the north.

From all these quotations from the texts ranging from the Scythian period down to the middle of the Muhammedan period, we find that certain feudal customs have been expressed in the aphorism of Yajnavalkya in a cryptic form. As this verse is to be found in a text which the Brahmanical priesthood regards as semi-revealed, the latter-day jurists either accepted it literally or tried to philosophize on it or explained it away. According to our modern sense of jurisprudence, we can understand the sense of family immovable property to be under some sort of joint ownership as we have found out that such a law existed in some mediaeval countries as well, but it is beyond comprehension that how stipend or *abwab, i.e.*, the extra payment or gratification from the businessmen could be of joint ownership of the father and the son. Such a custom of allowance existed in different parts of India till her Independence in the feudatory princely States. But such dues did not become hereditary. The officer collected it to supplement his poor salary and it had become the custom from a long time. But the officer's son and grandson never had any right on it. He collected it as long as he was in the service.

Hence the explanation of *Saraswatibilasa* does not satisfy our modern notion of jurisprudence. Similarly, the bipeds, *i.e.* the serfs have always been regarded as family property as long as they are bound on the land of their masters, slaves used to be manumitted as is evinced by Yajnavalkya himself when he enumerated different kinds of slaves that are to be given freedom under various conditions (II. 185-186). Hence it is contradic-

15. J. C. Ghosh: Op. cit., vol. II, p. 1005.

tory to Yajnavalkya himself when he at first speaks of grandfather's slaves who as chattels are to be the joint property of the father and the son, and the father has got no absolute right over them as he has inherited them from his father and it is not a self-acquired property; then he enunciates different provisions for manumission. On this account it may be likely that Yajnavalkya meant by goods other than bipeds.

Coming to Vijnaneswara we find him discussing about the right of the father over the movable and immovable properties that he had inherited from his father, and he quotes two sentences: "As for the text, 'the father is the master of the gems, pearls and corals, and of all (other movable property) but neither the father, nor the grandfather, is so of the whole immovable state'[16] and this other passage, 'By favour of the father, clothes and ornaments are used, but immovable property may not be consumed, even with the father's indulgence".[17] (I. 1. 21). These two anonymous sentences express the view that the immovable property remains as family property, the father or grandfather even has no right of alienation over it. Vijnaneswara opines that these "passages forbid a gift of immovable property through favour; they both relate to immovables which have descended from the paternal grandfather. When the grandfather dies, his effects become the common property of the father and sons; but it appears from this text alone that the gems, pearls and other movables belong exclusively to the father, while the immovable estate remains common." (I. 1. 21).

Then Vijnaneswara answers those who say that property is not by birth, and he says, "To this the answer is: it has been shown that property is a matter of popular recognition; and the right of sons and the rest, by birth, is most familiar to the world, as cannot be denied,.....For the text of Gautama expresses —Let ownership of wealth be taken by birth; as the venerable

16. Jimutavahana, Raghunandana and others of the Bengal School say that this sentence is of Yajnavalkya. But it is not to be found in Yajnavalkya. J. C. Ghosh and P. N. Sen say, it is of Narada, but it is neither to be found in Narada as translated by Jolly nor in the original text recently published from Calcutta.
17. This sentence is also unnamed.

teachers direct".[18] (I. 1. 23). Then buttressing his hypothesis on these anonymous quotations Vijnaneswara says: "Moreover, the text above cited 'The father is master of the gems, pearls, etc. is pertinent on the supposition of a proprietary right vested by birth.....This maxim, that the grandfather's own acquisition should not be given away while a son or grandson is living, indicates a proprietary interest by birth'." (I. 1. 24). Thus these anonymous and spurious quotations have stood in good need of Vijnaneswara for propounding his doctrine of right by birth. Further he elucidates, "But the text of Vishnu[19] which mentions a gift of immovables bestowed through affection, must be interpreted as relating to property acquired by the father himself and given with the consent of his son and the rest." (I. 1. 25). Finally, Vijnaneswara says: "Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, (although[20]) the father has independent power in the disposal of effects other than the immovables.....he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessors; since it is ordained, "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made".[21] (I. 1. 27)[22].

Then quoting the younger (?) Vrihaspati who allows a sale of immovable property during a season of distress, for the sake of the family, and specially for pious purposes, Vijnaneswara agrees that, "while the sons and grandsons are minors,..... or brothers are so and continue unseparated; even one person,

18. This sentence is also not to be found in Gautama's text. Achyuta and Srikrishna, the two annotators of Dayabhaga call it Spurious (Amula).
19. It is not in Vishnu, but of Narada as cited by Jimutavahana, 23.
20. Balam Bhatta.
21. Colebrooke says Vyasa as cited in other compilations, but not extant in Bengal edition.
22. Such a system exists among some of the tribes of Baluchistan.

who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family required it, or the support of the family render it necessary or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." (1. 1. 29).

Out of these rigmaroles of anonymous or spurious or unauthenticated quotations put up by Vijnaneswara in support of his hypothesis, finally we arrive at his theory of right to family inheritance by birth. Strangely, he has not quoted a single author of the age which stretches from the Rigveda down to Sumati Bhargawa's Manu-smriti of the Sunga era. All his quotations are taken from the authors of feudal age. He made the best of a bad case. But one thing is noticeable in his saying when he alludes to the fact: "Right of sons and the rest, by birth, is most familiar to the world" he hints perhaps to some socio-economic fact that was prevalent in his surrounding. Here, we can safely arrive at the fact that perhaps this custom had been in vogue in some part of India when Mitakshara was written. Regarding this suggestion of a custom that was in vogue in Vijnaneswara's time, it can be suggested that it was introduced by the foreign invaders that spread over the northern and western parts of India and settled there. This we find out from history and from the epigraphic records. Regarding the impact of the influence of the foreign settlers with the ancient Indo-Aryan law, Dr. N. C. Sen Gupta says, "The history of the development of Hindu law is to a very large extent a history of this mental interaction of these two bodies of law existing in India to count the influence exerted by large bodies of foreign customs which must have been imparted along with the successive raids of the Greeks, Sakas, Huns and the various Mongolian tribes in ancient times. The impact of Indian civilization with that of Assyrians, Persians and even Arabs must also be counted. It is only when we have taken an account of all these that we may get an insight into the inner history of Hindu law".[23] Elsewhere he says: "It is not always easy to say in what cases the adoption of non-Aryan

23. Nares Chandra Sen Gupta: "Sources of Law and Society in ancient India" 1913, p. 99.

institutions was due to their absorption by the Aryans and in what cases they were due to the other cause, namely, the imposition of Aryan culture on a non-Aryan community..... Something like this also happened to the Sakas and Huns who poured into India and established powerful kingdoms which were imperceptibly absorbed into the Aryan culture".[24]

Thus the idea of importation of foreign customs in Indian society by the foreign migrants when they became a part of the people cannot be ruled out, especially when they ruled as good and orthodox Hindus in some parts of the country for a long time. Here attention may be drawn to the fact that a kingdom existed in Ujjain for several centuries founded by Chastana, a Saka. Some of the officers of this State were Pahlavas (Parthians).[25] The last king of this dynasty who was destroyed by Chandra Gupta II in 388 A.D. was Rudrasimha III. Regarding these Saka rulers of Ujjain and of the North, the historian Hem Rai Chaudhury says: "A remarkable feature of the Scythian Age was the widely prevalence of the system of *Dvairajya* in Northern and Western India and *Yauvarajya* in N. W. India and far south. Under both these forms of government the sovereign's brother, son, grandson, or nephew had an important share in the administration as co-ruler or subordinate colleague. In Dvairajya the rulers appear to have been of equal status but in Yauvarajya the ruling prince was apparently vice-regent".[26] From this remarkable feature of the Saka system of rule, we get the information of co-rulership of the State by these foreign tribes. This gives us the clue whence Yajnavalkya and Vishnu got their conceptions of "common ownership" from. Also we beg to state here that the *Yauvaraja* system as depicted in the Ramayana was conceived by this percept of the foreign institution. It is an admitted fact that the Ramayana got its new recension during the Gupta rule. Thus, there has been no wonder

24. Ibid: "Hints on an historical study of Hindu Law" in Cal. Univ. Law Magazine, Vol. XIII, 1943, p. 10.
25. Vide: Ep. Indica, Vol. VIII, No. 6.
26. Hem Chandra Rai Chaudhuri: "Political history of ancient India, 1892, pp. 351—352.

that foreign political and legal concepts got imbedded in the Indo-Aryan *mores* during the long rule of outlandish tribes. Hence, these came out in the smriti-legislations as Indo-Aryan customs. In this connection we beg to refer to the hypothesis of K. L. Sarkar[27] who thinks that Yajnavalkya and Vijnaneswara were influenced by Buddhism. His thesis is, that as the orthodox Brahmans would not co-operate with the Buddhist rulers, hence some digests or compilations of the Hindu Law free from characteristic features of Brahmanical conservatism were made for them. The Mitakshara is one of such digests. He says, "The Mitakshara bears the impress of Budhist influence".[28]

But it is a big supposition. On the contrary, from history we get the news that Kautilya, a Brahman scholar co-operated with the Jaina emperor Chandragupta Maurya, and his son Radha Gupta was the minister of Asoka,[29] Again, as late as in the ninth-eleventh centuries A.D. we find in the Bengal inscriptions that the ministers of Buddhist Pala dynasty were all orthodox scholarly Brahmans.[30] Again, Sarkar says, "Mitakshara begins by discarding the fundamental principle taught by the Vedas, that property is for spiritual benefit, that its devolution depends on considerations of such benefit alone. Then, again, the tendency shown in the code of Manu and most of the Samhitas is to allow free partition and devotion. Certainly, there is nothing in them to tie up property, but the Bauddhas favouring monastic institutions were naturally partial towards the principles of perpetuity. And Mitakshara, too, characterises itself by favouring the same principle".[31] Here, the analogy does not hold good. We have discussed previously that the contrary might have been possible. Common-ownership of a joint-family could not have been inspired by the grants in perpetuity to the Buddhist monasteries donated by the Brahmanical kings. It got its roots elsewhere. The fiat of the priests did not alter the legal customs. Further he

27. Kishori Lal Sarkar: "The Mimamsa Rules of interpretation as applied to Hindu Law", (Tagore Law Lectures 1905), 1907.
28. Ibid: Op. cit., p. 21.
29. Vide Arya Manjusrimulakalpa (Jayaswal's translation).
30. Vide Gauda Lekhamala.
31. K. L. Sarkar: Op. cit., p. 22.

says, "what can be the reason for the Mitakshara becoming the governing law for almost the whole of India to the exclusion of Manu's code with able commentaries on it? This would be hard to understand except by supposing that the Bauddha kings considered Manu's code to represent orthodox Hinduism in a greater measure than the Yajnavalkya Samhita as explained by Viswarupa who was followed by Vijnaneswara. In this connection it may also be noted that according to Weber (Ind. Lit. p. 237), Yajnavalkya is virtually described in the Mahabharata, as a Buddhist teacher".[32] It is a hypothetical argument advanced to support his thesis. Much historical confusion is involved in this hypothesis. Modern investigations have thrown new light engendering a new perspective on the Indian history. There is no proof that the Buddhist kings of India followed any other code than the orthodox Brahmanical one. Even the Trans-Gangetic Buddhist countries still follow the code of Manu. Again, there is no proof as we have said previously, that Yajnavalkya of the Chhandogya Upanishad who held discourses with king Janaka of Mithila was the same person as the reputed author of the legal text. *Ipso facto* it is an impossibility. It is true that according to Weber's surmise, the Yajnavalkya of the Upanishad may be regarded as the fore-runner of the doctrines advocated by the anti-Vedic preachers like the Ajivakas, the Jainas and the Buddha of latter age. The similarity of the names should not mislead the historical question. Neither there is any truth in the assumption that Visvarupa and Vijnaneswara were Buddhists or crypto-Buddhists, Vijnaneswara speaks of himself differently. All that we can predicate is that the savants of the non-Vedic sects might have preached that civil law is secular. Of course, it is in their interest to say so. They, like the priests of mediaeval Europe might have wanted to divert the laymen's properties towards their monasteries by divesting them of Vedic ritual implication. But we have seen that the *Arhan-niti* of the Jaina preacher was a compound of Manu and Yajnavalkya's dicta. Hence the supposition of Sarkar does not hold good. From the historical perspective it is incorrect.

32. Ibid: Op. cit., pp. 21-22.

Sarkar in his thesis has brought the Mimamsa logic of Jaimini to bear upon the sayings of both the mediaeval jurists in question here.[33] Jaimini in Sutra 5 says, "Matters sanctioned by the Shastras should have preference." Kumarila in his annotation while discussing the meaning of the aphorism, says, "that, in order to determine whether a usage is in accordance with the Sruti, the secondary means of proof should not be disregarded, such as, figurative sense, splitting of senses." He also says that, "in cases of doubt the benefit of the doubt should be given in favour of the usage which savours of a Vedic character" (Tantravartika, p. 156). Here according to these Mimamsa logicians, a usage in consonance with the Veda should be tolerated. Again, Kumarila says, "If both the Vedic conclusion and Laukika (popular) conclusion be clear and self-evident, the former prevails without saying. Therefore that conclusion which is arrived at by shastric materials alone is superior and cannot be placed on the same footing with usage of a restricted, far-fetched and mixed character" (Tantravartika, p. 155). From this we glean that Vedic custom was to prevail over the popular usage. That is what Jimutavahana fought for.

In the next Sutra (6) Jaimini says, "An authorised matter expressed in foreign words, must be understood in the sense that those words bear in the foreign language".[34] Here we get an admission of the foreign influence in Hindu civilization. In this connection Jaimini gives an illustration of some words which he called as of *mlechha* origin, one of which is *pil* (arabic=elephant). In this matter of foreign influence, Sarkar says, "It appears, however, that later on foreign influences became aggressive..... Thus we find that Kumarila never loses a single opportunity of condemning *mlechha* language and *mlechha* usages".[35]

From the arguments of Kumarila we discern that foreign usages had already become engrafted in Indo-Aryan system, and Jaimini and the school of Mimamsakas who wanted to re-establish Vedic ritualism, were fighting tooth and nail in the name of

33. Quoted in K. L. Sarkar: Op. cit., p. 252.
34. Quoted in K. L. Sarkar: Op. cit., p. 260.
35. Ibid: P. 260.

Vedic purity. Further, Kumarila says, "Expressing parts of sacrificial duty, corrupt Aryan words are distinctly found, why then cannot such parts of duty be sanctioned in *mlechha* language? This holds good in the absence of any indication to the contrary. Thus the terms *pika* and *nema* and others like these are settled by the learned" (Tantravartika. Banaras ed. 158). Again he says, "*choditam* means taught or employed or incorporated into a corporation. Matters first settled by the *mlechhas* were subsequently known to the Aryas or by those who knew both the languages" (Tantravartika, p. 158). It is also an admission of the infiltration of foreign usage in Indo-Aryan polity. Opining on these sayings of Kumarila, Sarkar finally says, "The above clearly shows that the question is not simply a verbal one, it really relates to the adoption of *mlechha* usages as valid when such usages are referred to in the Shastras".[36]

This has been the task of the Yajnavalkya-Vijnaneswara school to get a Shastric sanction. Hence, under the covers of the name of a reputed rishi of Upanishadic fame, and god Vishnu himself, the outlandish idea of "common ownership" has been foisted in Indo-Aryan legal system, Later on, Vijnaneswara and his followers ransacked the sacred texts to buttress the innovation. Thus the sayings of these Mimamsa logicians support our claim that foreign usages had crept in Indo-Aryan society long ago. Again, a recent research scholar Mr. Delevoise says, "From the time of the Indian invasion by the Sacae, the latter are so closely connected both politically and culturally with the Parthians that they cannot be distinguished one from the other.....Indian officialdom probably contained both Parthians and Sacae".[37] Again he says, "Normally there were three contemporary rulers of royal rank in eastern Iran and north-western India: a 'King of kings' in Iran, some junior members of his family associated with him, and another 'King of kings' in India. The junior member in Iran usually became in due course the supreme ruler in India.....In eastern Iran the ruler issued coins together

36. Ibid: P. 262.
37. N. C. Delevoise: "A political History of Parthia", 1938, pp. 6-62.

with that member of the family associated with him in the government.....in the eastern Punjab the conquests of Maues remained to be completed by two of his successors, the first of whom Azes I. The king associated with himself one Azilises, who eventually succeeded him".[38] Further he says, "shortly after the first Sacae king commenced his rule in India,.....Vonones established himself in eastern Iran and took the imperial title. .....Azilises as king of kings in India made further conquests in the Punjab.....but either voluntarily or per force he relinquished Arachosia.....It was ruled by Vonones' brother Spalahares who held the territory conjointly with his son Spalogadames. One of the Indian princes, Azes II, became associated with Azilises in the Indian Kingship and eventually succeeded to the supreme power".[39]

In these historical facts we get the information that the Parthians who were mixed up with the Sakas and regarded as one, had the system of two rulers ruling conjointly one kingdom. In these historical news we get confirmation of what has been quoted above from the Indian historian. Another bit of news which the American historian gives us is the following: "In effect the Parthian empire became a vast feudatory power, a pyramid the apex of which was the king of kings, beneath whom came the Satraps, the nobles, the Greek merchants, and finally the native tillers of the soil".[40] The Parthian-Saka hordes captured the north-western part of India (the lands now comprising Afghanistan and western Pakistan) about first century B.C. and their influence was felt in the north and west of India till the rise of the Gupta power in the fourth century A.D. Here we like to state that the Saka landlords spread over to South India as well. Again, the author of the *Periplus* spoke of a remnant of the old Saka power existing in the Indus delta for sometime. It existed even in his time, and he described the struggle of the various petty chiefs for supremacy.[41]

38-39. Ibid: Op. cit., pp. 63-64, 65.
40. Ibid: Op. cit., "Introduction", p. xxxviii.
41. Vide: "Periplus of the Erythraean Sea" 38; also I. W. McCrindle in Indian Antiquary. VIII (1897), 107-51.

These informations throw some light on the twilight period of India's history when, along with the resurrection of Brahmanical orthodoxy, we find the rise of feudalism in Vakataka-Gupta era and feudal legal relations in the matter of property and inheritance. The coincidence is not accidental. There must be some historical relations between the administrative and legal systems introduced by the Saka-Parthian rulers and the rise of feudalism in India, and the theory of "Common ownership" of Yajnavalkya and Vishnu. It is up to the future investigators to trace the imprints of the footfalls of history of this period.

There is a Sanskrit proverb, "Like king, like subjects," which means, the subject imitates the ruler in his life. Hence, the "co-rulership", and the co-rulers being of "equal status" must have influenced the minds of the Indians of the time where the quasi-national rule of the tribes of foreign origin existed. We must remember that Kanishka ruled over a wide realm in India and beyond and at least it extended from Gandhara and Kashmir to Banaras.[42] Perhaps he extended his influence also over eastern India.[43] As there cannot be any concept without a percept, the idea of common or equal-ownership did not come to Yajnavalkya and to Vishnu ready made out of their heads. The people certainly were copying their rulers. And these two legislators living at that period gave a legal sanction to the fact that cannot be altered by a hundred texts—according to the expression of Jimutavahana used several centuries later.

Here, a question may be raised, that seeing the people donating their properties to the Buddhist monasteries, the orthodox legislators named above must have foisted this novel theory of "common ownership" to counteract the wholesale donation that was in vogue in the country. This theory and the *joint-family* system that was the natural outcome of this rule, must have made alienation of the ancestral property to the Buddhist Samgha impossible. On this account, the innovation was made in some of the smritis. But we have found out that the Brahmanical

42. Ibid: Op. cit., p. 322.
43. K. P. Jayaswal: in J. B. O. B. S., XVIII. 15.

priesthood has not been united in this attempt. Narada, Devala and others have stuck to the old doctrine, only some of the latter-day commentators and the Nibandha-writers outside Bengal added strength to this novel theory which spread over the country, when the theory as a *fait accompli* has been embedded in the *mores* of the Hindu socio-economic system. Yet, other Nibandha-writers like the author of Smriti-Samgraha and Dhareswara, Uddota, Halayudha were against this novel theory. The orthodox priestly party never accepted it. They were not allured by the semi-divine name of Yajnavalkya. They rejected it as contrary to the scriptures.

Hence, the above-mentioned suggestion is not acceptable. Lastly, in order to justify the existing usage of the part of the country where Vijnaneswara lived, he gave a twist to Yajnavalkya's aphorism and brought out the newer theory of "right by birth." Coming back to Vijnaneswara, we find that in order to justify his position and to give a time-honoured sanction to his novel theory, Vijnaneswara not only had to press Yajnavalkya to his service, but to quote anonymous and spurious floating sentences to buttress his standpoint. The matter of justifying this novel theory originating in the region now-a-days called *Maharastra* and which the anthropologist H. Risley has said to be populated by a people of "Scytho-Dravidian" origin, and susceptible to foreign migrations across the sea, became extremely ludicrous when even in the seventeenth century Nilkantha quoted the alleged aphorism said to be contained in the Institute of Gautama in defence of ownership by birth by saying:—for, from the plain sense of this text (Gautama), 'Even by birth, ownership in wealth is obtained' he shifted his position by making a backward somersault from Yajnavalkya to Gautama![44] But we have seen that already in the sixteenth century, Srikrishna and Achyuta had denounced this aphorism as unauthenticated. Yet Nilkantha has quoted the anonymous sentences mentioned by Vijnaneswara without throwing any light on the sources.

This attempt to justify a non-Indo-Aryan legal custom by quoting the smritis suitable to the purpose, remind us of the attempt of

44. Vide J. C. Ghosh, Vol. II. "Vyavahara Mayukha".

Raghunandana to justify from scriptures the Scythian custom of burning the widow at the funeral pyre of her husband which had got embedded in the *mores* of the Hindus since the Gupta period. In order to get a scriptural sanction, Raghunandana quoted several Nibandhas of latter days which were apparently not strong enough for his purpose, hence he had to falsify a Rig-Vedic sentence to get an authoritative Vedic sanction for this outlandish custom. Similarly, from Vijnaneswara down to Nilkantha, that is, the New School, had to resort to all sorts of fancied Sanskrit sentences as scriptural authorities. But none of these digest-writers could prove this novel theory from the Veda, the source of Indo-Aryan civilization. Next to it, comes the text of Manu which is accepted as the final authority among the smritis. Hence, we are justified to regard the novel doctrine of this school as of non-Indo-Aryan origin, and of outlandish importation.

It will be shocking to orthodoxy to hear about this new interpretation of origin of this novel doctrine of right by birth. But it had been the habit with the ancient Indian writers never to acknowledge debts they owed to foreign culture. How much of Brahmanical or Hindu culture is Indo-Aryan or Indian is not yet properly evaluated. The Dialectics of historical materialistic processes are constantly making changes in the evolution of Indian society. New phenomena are constantly propping up out of thee dialectical processes. Even the Hindu law of both the schools have undergone changes due to the decisions of the British-Indian courts and of the Privy Council. These decisions have become parts of the Hindu law as practised in India to-day.

As regards, the origin of the Bengal School of Hindu law, we have traced it to its original source—Manu and the previous writers. The Indo-Aryan legal concepts as expressed in the Vedic literature and in latter day Kautilya's text and the "Manu-smriti" of Sumati Bhargava's recension, and the recension of Narada, known as "Narada-smriti" have been in vogue in the East. During the revival of Brahmanical orthodoxy in Bengal after the fall of the Buddhist-Pala ruling dynasty, Mimamsa began to be studied along with Gautama's Logic. The Brahman thinkers began to drink deep in the wells of orthodoxy. To

them pre-Buddhist sources of Smritis were more dear than the Smritis and Nibandhas of the Feudal Age. As a result, orthodoxy got a *furor* to re-establish Brahmanism as it existed in its pristine days. This resulted in the attempts of the Varmana and the Sena rulers to obliterate every trace of Buddhist culture from Bengal and to re-instate Brahmanical orthodoxy. In this transitional period we got the *Dayaratna* of Jimutavahana of which 'Dayabhaga' is a part. Thus, the Bengal School became the lineal recipient of the current of law that emanated from the Indo-Aryan *mores* and transmitted through Kautilya, Manu, older Vrihaspati, Devala, and Narada, etc. Mayne acknowledged that "Brahmanism was rampant among the law-writers of Bengal".[45]

But there is one peculiarity about the Bengal School. It admits the cognates in the order of succession. This has been the moot point among the modern Indian lawyers. All sorts of suggestions have been given as an explanation to it. But one thing has been left out of account, that is, the anthropological approach to it. We should say that it was not the kindness flowing out of the heart of Jimutavahana for the deprived females of the family that made him admit the cognates as reversioners in the order of succession, but there was customary sanction behind it. The people of Bengal were a *nation* at that time.

In our comparative study of foreign legal systems we have found out that in the tribal system, agnatic succession was the rule as all properties were kept within the sib. But when the tribal system weakened and the different sibs coalesced on their way to nationality, the agnates as well as the cognates came together in the order of succession. Similar has been the case in Bengal. The tribal system, as it is elsewhere in India, never existed in Bengal since the introduction of Indo-Aryan civilization and culture. Only the Vedic Literature (Aitereya Aranyaka II. 1. I.) speaks of some ethnic tribes. In historical period we find the name of the *Samvangias* mentioned in an inscription of the Mauryan period.[46] But long ago, the ethnic groups have been transformed

45. J. D. Mayne: "A Treatise on Hindu Law" 7th Ed. 1906 p. 328.
46. Ep. Ind. Vol. XXI. No. 14. p. 85.

into Castes. The old "Vrihaddharma Purana" and "Brahmavaivarta Purana" speak of all peoples except the Brahmans as of mixed caste. In Bengal Hindu society there is no trace of clan or tribal system. Rather during the Pala period we hear of the next higher stage towards formation of nationhood, the *Janapada system*. The people are identified with its country, viz. Rahri, Varendra, etc. Then the Palas united all these countries into one Bengal.[47] The people became one nation. There was no clan or tribal system to disunite them. Only there was the caste system to divide them. Hence, like other countries in nationhood, the people of Bengal having done away with the sib system if they had it previously, had no urge to keep the property confined within the agnatic line. To them the order of succession followed the nearest *sapinda*. And this was being advocated since the time of the emperor Dharmapala by Srikara. On this account, Jimutavahana brought out shastric injunction to give legal sanction to what perhaps already had been the custom in Bengal. As regards an important point in Jimutavahana's doctrine: the late lawyer Golap Chandra Sarkar Shastri[48] has brought out a pertinent question regarding his giving absolute right to a *propositus* in grandfather's immovable property. He thus says: "But the father cannot alienate ancestral immovable property (D. B. ii. 23) excepting a small part (D. B. ii. 26), nor a corrody (D. B. ii. 25). He is competent to alienate the ancestral immovable property only for the support of the family and not otherwise" (D. B. ii. 26). This limitation on the absolute right of the father is according to the writer reduces, the father's estate in the ancestral immovable property, therefore is similar to the widow's estate in the husband's property..... From what he says is clear that the father is not the absolute owner of the ancestral immovable property (D. B. ii. 21-26). He there maintains that the father may transfer his self-acquired property any way he pleases, without the concurrence of his sons, notwithstanding a text of law to the contrary, which must be con-

47. In inscriptions emperor Dharmapala has been called "Gaudendra Bangapati" (vide Ind. Antiquary. Vol. 12. p. 160).
48. G. C. Sarkar Shastri: "Hindu Law." 8th Ed. 1940 pp. 459-461.

strued to impose a moral duty.....for the nature of the father's absolute ownership in his self-acquired property—or the capacity to deal with such property according to his pleasure, which is the legal incident of ownership—cannot be altered by even a hundred texts" (D. B. ii. 29-30).

Then the writer says, "Herein the auther of the Dayabhaga is said to lay down the doctrine of *Factum Valet.* By an improper extension of the doctrine of Factum Valet the courts have come to the conclusion that the father is the absolute owner of the ancestral property, so that there is no distinction between a father's self-acquired and ancestral property as regards his right of disposing of the same either by an act *inter vivos* or by a *will,* and that a son has no right except that of maintenance" (Tagore vs. Tagore 18. W.R. 359). But at the same time the learned text-writer says, "The author of the Dayabhaga, notwithstanding to explain away the text.....and to indicate in one place that the ownership thereof is exclusively vested in the father has, however, been constrained by reason of the above texts, to admit some right of sons therein.....".

But other legal experts interpret it differently. Sen says, "The Dayabhaga, however, brushes all these distinctions aside by holding that the father, as long as he is alive, is the absolute owner of all his property, whether ancestral or self-acquired, and the son does not acquire any ownership by his birth and only upon the extinction of the father's ownership either by his death or in any other way".[49] Again J. D. Mayne says, "the absolute ownership of the father enables him to deal with his ancestral property as he likes".[50] On the other hand, we have seen that Jimutavahana has previously laid the general rule by quoting the ancient smriti-writers that "the sons have no ownership during the life-time of their fathers,.....and in grandfather's wealth there is no ownership of the grandsons and partition will take place with the permission of the father" (24). Again, the commentator Srikrishna while commenting on the

49. P. N. Sen: "Tagore Law Lecture" 1909 p. 139.
50. J. D. Mayne: "A Treatise on Hindu Law and Usage." 7th Ed. 1906 p. 330.

aphorism of the text: "The father is master of gems..... whole real estate" says, "But when the (grandfather's) estate consists not of land, corrody, and slaves, but only of gems and other movable property, there the father has not power to consume or dispose of all; since the reason is the same, and the text which declares the father to be *master* applies where the estate consists of both movable and immovable property"[51] (annotation to Dayabhaga 27). Again, the same writer (Srikrishna) while annotating Narada's aphorism—"for the father is lord of all" says, "Lord" that is possessed of the power to alienate at pleasure. (Daya Krama Samgraha. p. 94). Again, Raghunandana[52] (classmate of Chaitanyadeva who was born in Saka era 1411, i.e. 1489 A.D. vide Vyavastha Darpan. xi), another important pillar of Bengal speaking in this matter says, "A father has not the power to make an unequal distribution of ancestral property, consisting either of land or a corrody or slaves.....and the text of Yajnavalkya which declares, 'the ownership of the father and son is the same in law.....' is intended to restrain the exercise of the father's will; for..... it is impossible that as long as the father, the owner of the ancestral property, continues to survive, his sons should have ownership therein".[52A]

Further, the latter day Vivadabhangarnava of Jagannath Tarkapanchanana, expresses itself in this matter by saying that, "ownership or dominion over the father's estate during his life is not propounded by declaring the equal dominion of father and son over property inherited from the grandfather, for that inference has been already disproved. But the father alone has *absolute* property; and equal dominion is affirmed to show that no unequal distribution can be made in this case".[53]

51. "Vyavastha Darpana" p. 365.
52. Vide "Dayatattva" of Raghunandana, translated by G. C. Sarkar Shastri, 1904 p. 91.
52A. The judicial decision of the British-Indian Courts have been that a son has no right in the ancestral property inherited by his father during his father's life-time, Vide Kamala Kanta Chakravorty, 4 Sel. Rep. 322, new Edition, 410.
53. "Vyavastha Darpana" p. 369.

From these theorizings of the stalwarts of Bengal school we can easily detect that absolute right in paternal wealth, movable or immovable, was in the *mores* of the people of Bengal of which they tried to give a legal sanction from the scriptures. Further came the neo-Brahmanical revival under the aegis of the orthodox rulers. The propagandists of neo-Brahmanism were staunch believers of the priestly smritis which stood next to the revealed *Sruti* as revered texts. But the dialectics of historical processes demanded a synthesis between the existing custom and the priestly smritis. That was the difficulty with these digest-writers. Jimutavahana and his school could not deny the actual facts current in the country. Again they could not set aside the conflicting opinions of the smritis, Jimutavahana taking his stand on orthodoxy had to refute his adversaries who also swore by the holy smritis. Though he accepted Manu and the other texts of the older school, yet as an orthodox Brahminist and a member of the priestly order, could not deny Yajnavalkya. Hence, he and his school tried to synthetize the divergent opinions. Jimutavahana himself admitted that he had made a synthesis of the conflicting opinions (Vide—Colophon). Here lies his difficulty, and his modern critics say here lies his weakness. He tried to explain away the dicta of Yajnavalkya. At the same time, like the tortoise after the feet of Achilles, the custom of the country could not be ignored. He had to give a shastric interpretation of the actualities of his country. Hence, he applied the theory of what is known as *Factum Valet* by saying that "a fact cannot be altered by a hundred texts".

Thus from this dictum, the hidden fact of law is revealed to us that the people of Bengal used to have absolute right in ancestral property, movable and immovable, ancestral and self-acquired. And there was no obstructed and unobstructed succession. From the internal evidences that we get from the writings of the Bengal school of law we can surmise that feudal legal relations introduced elsewhere in India, did not take roots in the soil of Bengal. Bengal shed off the tribal system in remote past, became a homogeneous nation and had developed industry and commerce of her own. It is also probable that with the overthrow of the Pala rule and with the introduction of neo-

Brahmanism under the aegis of the Varman, Sura and the Sena rulers, Bengal had a strong shake up of her socio-economic structure. Bengal was in the next plane of evolution of her civilization. As a result we find a joint-family system on the pattern of "tenant-in-common" basis, a system of inheritance which combined the agnates and the cognates in the order of succession, and the absolute right of the father in paternal properties.

From all these we understand that Bengal on the eve of Turkish-Moslem invasion was on the road to that phase of legal development which was entered upon by the nations of the European continent in the nineteenth century. Hence, we find some points of resemblance between their new codes and the Bengal School of law.

Now a little more about the nature of Jimutavahana's legal philosophy. Jimutavahana like the other digest-writers since Viswarupa and Vijnaneswara had to adapt himself with the probable usages of the country. Here lies the divergences in Hindu law since the last one millenium. There was a conflict between the orthodox rules and the local usages. From Kautilya downward to the author of Sukranitisara, all have said that the customs and the usages of *Shrenis* (guilds), *Nigamas* (town authority), *Janapadas* (localities) must be respected. The Kings should accept their customs as their laws. On this account there had been two sets of laws still current in the country. The unwritten customary law, and the written scriptural law. But the Indo-Aryan culture as evinced in the Vedic Literature and in the Smritis, had superimposed its authority over the society. This process is still going on. That is the reason why we find the agricultural peoples of the Punjab having their own customary laws. The same had been in Malabar till lately where the matrilineal succession has recently been abolished in favour of patrilineal succession. The aforesaid obtains in the South where Brahmanical smriti-rules are imposed on the non-Brahmans. This had led Mr. Nelson, a former British-Indian magistrate to make an appeal to halt this superimposition. He says, "Some ten years ago, when engaged in performing an account of the various tribes and castes of the Madura country

for the 'Madura Manual', and presiding over the Court of Small Causes in the Madura district, I was greatly astonished to find that the usages and customs of the natives of my district were altogether different from the usages and customs popularly supposed to be proper to Hindus and that were judicially recognised by the High Court of Judicature at Madras..... Since then.....a tolerably long experience of disputes of all kinds between persons belonging to many Tamil-speaking castes and tribes has convinced me that the Tamils of the Madura province as a body, do not possess, and never have possessed, a body of positive laws; and though the greater number of them may have adopted in part the Brahmanical form of religious worship, they have not adopted in part the Sanskrit law that is a branch of the Hindu religion.....And what I am persuaded true of the Tamils in this respect, I believe to be true of the Telegus, Canarese, and other people of the Madras Province also". Then he says, "the partial recognition of the peculiar customs of the western coast is an accomplished fact of great significance and importance.....To call attention to the absurdity and injustice of applying what is styled the 'Hindu law' to the great bulk of the population of the Madras province is the main object of this little essay".[54] Mr. J. D. Mayne as one time advocate-general of Madras says, "In much that he says I thoroughly agree with him".[55] In similar strain speaks J. J. Holloway in his judgment in Kalloma Nachair vs. Darasinga Teval (6. M.H.C.R. 310) case. He says, "I must be allowed to add that I feel the grotesque absurdity of applying to these *Maravars* the doctrine of Hindu law. It would be just as reasonable to give them the benefit of the Feudal law of real property. At this late day it is however impossible to act upon one's consciousness of the absurdity. I would not, however, be supposed to be conscious of it".[56] Again, Mr. Ellis, speaking of Southern India says, "The law of the *smritis* unless under

54. J. H. Nelson: "View of Hindu Law as administered by the High Court of Madras." 1877 pp. ii-iii.
55. J. D. Mayne: Preface. xii.
56. Quoted by Nelson. p. 29.

various modifications, has never been the law of the Tamil and cognate nations".[57] The same opinion is stated in equally strong terms by Dr. Bunell.[58]

On close examination it will be found out that there is a great divergence between the Brahmanical ideational injunctions of the *smritis* and the usages and customs of the common people.[59] Indo-Aryan culture is a superimposition from above. India is not completely Aryanized in culture, the process of Hinduization is still going on. As yet all the "Hindus" are not yet Brahmanized. Hence, we cannot say that Mitakshara is the original law of the Hindus and it bespeaks the family-communistic stage of India's development, and Dayabhaga got its individualistic turn due to extraneous influences. It is an absurdity on the face of it. Here, we remember that the post-vedic Gautama and the mediaeval Kumarila were impatient with customs other than the Vedic ones. Yet, from Yajnavalkya downwards, the legislators have advised that local usages must not be infringed upon. But, in the non-Hindu period of India's history, the smriti-laws as embodied in the mediaeval digests have been forced upon the people by the Brahman *Pandits* who advised the newly set up Hindu Kingdoms and the Muhammedan rulers in legal matters. In this way, Yajnavalkya's commentary Mitakshara got acceptance over a wide tract of the Country. Again, during the British rule the same phenomenon took place. The Judicial Committee was advised by the *Pandits* of different provinces to take Mitakshara as their guide-book in legal matters. As has already been said, thus Mitakshara got its importance in British-ruled India. This resulted in Brahmanical ideational legal rules being thrust upon those peoples who were not enough Brahmanized in culture. Hence, we find the investigations of Borradaile in western coast, of Tupper in the Panjab betraying the existence of another set of law of inheri-

57. Quoted by J. D. Mayne. p. 2.
58. "Introduction to the Dayabhaga. 13; Varadarajah, 7.
59. Prof. R. Sharma of the Patna University, who was deputed by the Government to make sociological investigation among the common people and the aborigines, informed the present writer that there is a great divergence of custom and usage between the Brahmanized upper castes and the lower castes of the province of Bihar.

tance, and the wailings of Nelson and Holloway depicting the anomalous position of law in the south.

From all these investigations we find that Yajnavalkya had never been a universal code even among the people with Indo-Aryan culture. That local usages and customs have forced the mediaeval jurists to modify Mitakshara in order to meet local customs. They could not propagate Mitakshara *in toto* though they accepted it as their guide-book. The political weakness of Bengal in the Muhammedan period may account for the non-acceptance of Dayabhaga outside the province during the Muhammedan domination. Yet, Dayabhaga has not been ignored in other provinces. Regarding it, Sri Panchanan Ghosh says, "It is true that the Bengal school is authority in Bengal; but it is not true that that school is no authority in India outside Bengal, just as it is not true that the Mitakshara is no authority in Bengal".[60] To-day with the evolution of an industrialized India, the doctrines of Jimutavahana are gaining ground. The different acts enacted by the Legislature during the British regime have shattered the core of Mitakshara legal system. Thus says Sir Venkata Subbarao, a retired judge of the Madras High Court: "the Hindu Women's Right to Property Act 1937, is a fine tribute we of this generation have paid to the courage and vision of the seers of the past, e.g. *Jimutavahana*..... The revolutionary enactment of 1937 which has the law of Jimutavahana in certain respects the law for the whole of India is a notable measure not only because it testifies to the sense of realism of the master-mind but because it signifies the triumph of liberalism of reason over authority, of substance over form.....the *Mitakshara* in the matter of joint-family worked oppressively. It was a buttress of conservatism because the wealth was static. Under the repeated onslaughts by the Privy Council its rigours were mitigated slowly but gradually. The system was all but strangled when it was held that unilateral declarations can disrupt joint-families. The coparcenary system is now at its last gasp and it

60. Panchanan Ghosh: "The place of logic in the Bengal school of Jurisprudence" in the Calcutta University Law College Magazine. Vol. XIII. 1943 p. 19.

remains for the Legislature by a bold measure to sound its death-knell. Then we shall have reacted what Jimutavahana has achieved long ago".[61]

Further, regarding the difference between both the schools Sri P. Ghosh says, "The school of the East rested on reason..... the Nyaya school of philosophy—whereas the rest of India relied upon authority. The place of logic is higher in the Bengal school of Hindu jurisprudence. The founder of the school was *Jimutavahana*.....one of his maxims, as we all know, is that 'a fact cannot be altered by a hundred texts'. It is on this that the ownership of the acquirer was rested and justified. It was on this account that wealth was made dynamic, so that it might play its part freely in the welfare of the community. It was this reason and necessity that made the father who had been but the manager of the family property, the sole owner thereof. The rest of India had still as their guiding rule the principle of corporate ownership. If diarchy is anarchy, polyarchy is *a fortiori* so. The *Mitakshara* coparcener's ownership was, therefore, no better than no-ownership. The *Mitakshara* father in the matter of alienation is hardly better than the widow, the *shebait* or *mahant*, the guardian of an infant, or the committee of lunatics—all bound by Hanuman Prasad".[62]

Regarding this fundamental difference between the Bengal school and that of the Banaras school, J. D. Mayne says, "There can be no doubt that Brahmanism was rampant among the modern writers of Bengal. I think it can be shown that it was this influence which completely remodelled the law of inheritance in that province by applying tests of religious efficacy which were of absolutely modern introduction.[63] We can easily see why this influence was more powerful in Bengal than in Southern and Western India, where the Brahmans had never been so numerous, than it was in the Panjab, where Brahmanism seems from the first to have been a failure (vide 2 Muir S. T. 482). But it is difficult to see why a similar system should never had been developed in Banaras, which is the very hot-bed of Brahmanism.

61-62. Vide quoted as above by P. Ghosh, pp. 20, 22.
63. But we have already found out that it is not the fact.

Much may, perhaps, have been due to the personal character and influence of Jimutavahana.....It would be unphilosophical to suppose that he originated the changes we have referred to. But if he had had the acuteness to see that these changes actually has taken place, the wisdom to adopt them, and the courage to avow that adoption, it is obvious that a work written under such inspiration would take precisely the form of the Dayabhaga .....On the other hand, the Banaras jurists, in consequence of the very strength of their Brahmanism, would continue slavishly to reproduce their old law books without caring or daring to consider how far they had ceased to correspond with facts;.... If any writer of equal authority with Jimutavahana had arisen in Southern India, and had represented plainly the usages which he found in force and painted up the picture with a plausible colouring of texts, we should probably find the Mitakshara as obsolete in Madras as it is in Bengal".[64]

Primogeniture system.

We have previously discussed that in some of the Indo-European peoples, the eldest son used to get a preferential share during partition of father's property. It has been the case with the classical Greeks. But its trace could not be found in Roman legal system. It was after the overturning of the Roman empire by the northern barbarians, that they formulated the custom of Primogeniture. But after the formation of the National States in Europe in the nineteenth century, the system has been abolished.

Similarly, in India, there is no trace in Rigveda of the eldest son getting a preferential share in his father's property. The pre-Mauryan writer Apastamba had been against it. But since that date, we find the slow growth of the system as attested by Kautilya, Manu and later writers that the eldest son gets a preferential share in father's property after his demise.

Then in mediæval period when feudalism was the socio-economic order of the society, we find Primogeniture, i.e., preferential share

64. J. D. Mayne: Op. cit. pp. 328-329.

given to the eldest son was sanctioned. But in the latter period, the Primogeniture, i.e., preferential share of the eldest son was giving way to equal partition among the brothers. There could not be any preferential right or Primogeniture in any form when theory of common-ownership in ancestral property was propagated. In the closing period of mediæval days we find that Primogeniture was completely discountenanced. The system of Primogeniture arose out of the right of preferential share of the eldest son in his father's property. But there could not be such a system where the equal division had been the rule. But it lingered as a family custom (Kulachara) among the ruling families or among some aristocratic families. The abolition of the princely States and landlordism by the National Govt. has swept aside the custom *defacto* amongst the privileged classes. Only it awaits *dejure* sanction for its final disappearance.

VIII

JOINT-FAMILY SYSTEM

In our perusal of Hindu law we have seen that the question of Joint-family has cropped up since the mediaeval days. In the Vedic Literature we have heard of the patriarchal system of family. In our comparative study we have already found out that it was the common system with the other Indo-European peoples of antiquity. Again, relying on the Smriti-texts we have inferred that there had been a tendency to "single family" system as evinced in provision in law about the "re-united" members of the family.

But the joint-family system as such, we find mentioned in the Mitakshara and in Bengal law of Dayabhaga. We have previously said that through the force of dialectics of historical materialistic process, the patriarchal system has evolved in Joint-Family system of to-day in India. Since the days of Morgan and H. S. Maine, various attempts have been made to derive it from village communism which is regarded as the descendant of tribal communism. Some, again, would derive patriarchal family from a wider Joint-Family. But we have seen in our investigations that these institutions have been non-existent in Indo-Aryan society.

Again, the Nairs of South India have developed a joint-family system in Canarese and Malavar *tarwads* without passing through the patriarchal system. The Nairs are noted for their kinship through females. Regarding the evolution of this Indo-Aryan institution, J. D. Mayne, says, "The transition from the Patriarchal to the Joint-Family system arises (where it does arise) at the death of the common ancestor, or head of the house. If the family chose to continue united, the eldest son would be the natural head.[1] But it is evident that his position would be very

1. Vide Manu. IX. 105.

different from that of the deceased patriarch. Hence Narada says, 'Let the eldest brother, by consent, support the rest like a father; or let a younger brother who is capable, do so; the prosperity of the family depends on ability'.[2] In the next place the extent of his authority is altered. He is no longer looked upon as the owner of the property, but as its manager.[3] He may be an autocrat as regards his own wife and children, but as regards collaterals he is no more than the President of a Republic .....They also will come to look upon him as the manager, and not as the father. The apparent conflict between the sayings of the texts of the Hindu sages as to the authority of the father may, perhays, be traced to this source. Those which refer to the father as head of the patriarchal family, will attribute to him higher powers than those which refer to him as head of a joint-family".[4] It is a plausible explanation of the evolution of the Joint-family system from the patriarchal one.

Now let us see what do the Smritis say. At first Manu says, "After the death of the father, the brothers if they stay abroad, should return and divide the deceased father's property, and after the demise of the mother should partition her property, as there is no ownership of the son during the lifetime of the father" (IX. 104). From this we understand that the father is the master of all his properties. Then he says, "where the eldest brother is religious-minded and all the brothers desire to live unitedly, there without partition, the eldest brother alone would take the wealth as a custody, the younger brothers would respect him like a father, and would depend on the eldest for their maintenance" (IX. 105). Again he says, "The eldest by living together with the younger brothers would maintain them like a father who maintains his sons, and the younger brothers would obey the eldest like a father" (IX. 108). Further he says, "In this way they should live undivided, or desirous of earning merit by performing five sacrifices separately, they should live separately" (IX. III). Here is an injunction for optional single-

2. Vide Narada XIII. 5.
3. Maine: Early Institutions. 116.
4. "J. D. Mayne: pp. 21, 22.

family system. Lastly we hear that when the brothers assembling together divide the paternal property, then before the partition they should divide the property into twenty parts. One part should be given to the eldest brother, and also he should take the best of all the goods. The second brother will take one share of the fortieth part, and the youngest will take one share of the eightieth part, and the rest will be divided equally amongst all (IX. 112).

From these injunctions of Manu we do not get any idea of joint-family system and joint-property. They clearly enjoin that after the demise of the father, the brothers may live under the same roof unitedly under the administration of the religious-minded eldest brother or may live separately. Hence, it follows that joint-family was not *de règle* in that time. But if they preferred to live separately they had to divide the paternal property according to the direction given by Manu. From this injunction though recommendatory only, we discern that there was no compulsion to live jointly in the time when the present-day Manu-smriti was written. Here we should remember the saying of old Manu quoted by Yaska that Manu divided his property among his four sons. On the other hand, the tendency of forming "single-family" system, that is, breaking away from the family after the demise of the father was discernible.

Coming to Gautama who is regarded as the oldest of the smriti-legislators, we find that his injunction regarding paternal property is the same as Manu (Ch. 19). Then he says, the wealth of the deceased person will be divided among the members of the joint-family (*samsrista*). After the demise of the brother living in the joint-family, he who lives separately will get the share of the eldest brother (Ch. 29). From this news we get that the brothers used to live either in a joint-family or separately.

Coming to mediæval Yajnavalkya we find him saying: "Before entering into a joint-family when partition is made of wealth, then if the conceived wife gives birth to a son after the demise of the husband who has entered into a joint-family relationship, there the surviving member of the joint-family is obliged to give the joint-share to the posthumous son; but if he dies leaving no son, then the surviving brother of the joint-family becomes the

heir of the deceased (II. 141)". Here we get information that kinsmen used to enter into joint-family relationship of their own accord, but it has not been compulsory. Now, we find Bishnu, a still later mediæval text writer repeats the above-mentioned text of Yajnavalkya in *toto*. "The son of a uterine brother united in a joint-family will get his share from the hands of the other united brothers" (17. 17). From Vishnu we gather clearly the information of a joint-family system though at the beginning the text speaks of partition of the paternal wealth by the father, and his arbitrary will in the matter of the partition of his self-acquired property (17. 1.). Strangely, we do not hear of joint-family in the earlier smritis like Baudhayana and Apastamba.

From these sayings we can gather that after the demise of the father, it was optional for the brothers to live together under the same roof under the guardianship of the eldest brother, or to live separately. But economics is a stern factor in human life. Hence the preference to live together got the upperhand in society of the feudal period when the theory of common ownership in paternal property got acceptance. When paternal property was declared to be of joint-ownership for three generations, the natural corollary has been for the collaterals to live together and to enjoy the property conjointly. Thus the patriarchal family changed by economic pressure into a joint one. And with the advancement of the Mitakshara doctrine of right by birth which is the natural outcome of the theory of common ownership, the co-operative family-life transformed itself into the joint-family system with legal values similar to the mediæval German family of undivided community in "collective hand", and English "Joint-tenancy".

In this evolution of Indo-Aryan patriarchal family system to joint-family system of the Mitakshara school, we find the similarity with ancient Roman Joint-family, and the mediæval German family in "collective hand", and modern English Joint-tenancy. These are the cases of convergent appearances in legal development of these societies. In these cases, the coparceners have unity of possession.

As regards Bengal Joint-family the sons after the demise of

their father, are co-heirs with the power of alienation of their shares in severalty. The co-heirs are similar to the tenants-in-common. Again, the Bengal rule of joint-family is similar in some respects with the modern German code. The modern law says,[5] "in particular, individual objects included in the estate can be disposed of, in accordance with the principle of Collective Hand, only by all of the co-heirs together". Thus so far it agrees with Mitakshara law; "whereas alienation of the entire estate can be made independently by each co-heir, in accord with the 'quotal' principle, to the extent of his share; only, in the latter case his co-heirs' rights of pre-emption restricts his dispositive freedom.....as respects their legal relations among themselves during the continuance of the community, the rules of community in undivided shares are applied; so that every co-heir can demand at anytime a dissolution of the community." Thus, the latter part of this provision agrees with Bengal "joint-family" rules about alienation of his quota in the property and the dissolution of the jointness of the family save the corrective of pre-emption.

This development of the modern German law about joint family helps us to understand the evolution of Hindu Joint family system. In the early history of the Germans, their family law was of a patriarchal character.[6] In the mediaeval period when feudalism had its sway in the body-politic of the people, family law took the form analogous to Mitakshara type of family and its laws. But with the industrialization of the country and the establishment of national unity the family law was changed by the Code of William II. in 1875 which bore some analogous characters with Bengal Joint-family rules.

The position of both the Hindu systems are clearly defined by the judges of the Privy Council and the British Indian Courts. In a judgment Lord Westbury said, "According to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, particular member,

5. Sohm: Op. cit. pp. 710-11.
6. Sohm: Op. cit. p. 63.

has a certain definite share".[7] This is the Mitakshara system of joint-family where the father is the manager of the estate only, and the members are joint-owners. On the other hand, in the Bengal system, the position of which according to J. D. Mayne in some respects is less favourable and in other respects, apparently, more favourable than that of a family under Mitakshara law,[8] after the demise of the father during whose lifetime his issues had no legal claim on him or on his property, the brothers or the co-heirs hold their shares in a sort of quasi-severalty, which admits the interest of each, while still undivided, passing on to his own representative, male or females, or even to his assignees.[9] The Supreme Court of Bengal in a passage has laid down the following propositions as the characteristics of Bengal Joint-family property: "First each of the coparceners has a right to call for a partition; Second, on the death of an original co-sharer his heirs stand in his place and succeed to his rights as they stood at his death; his rights may also in his lifetime pass to strangers, either by alienation, or as in the case of creditors, by operation of law; Third, whatever increment is made to the common stock whilst the estate continues joint, falls into and becomes part of that stock".[10] Thus in Bengal system the coparceners (co-heirs) become co-owners.

Thus we find that from original patriarchal system of old days, the modern systems have taken their rise. The bifurcations must have taken place before Jimutavahana's advent.[11] Both the systems have had a common origin, and the economic factors must have wrought changes on the old structure necessitating in splitting up the system into two kinds. The dialectical changes originating out of socio-economic factors have been covered by the legal sanctions of both the schools as a "fact cannot be altered by a hundred texts." It is not the patriarchal system or the impact of Islamic influence that have wrought this change in

7. Appovier vs. Rama Subba Aiyar, 11 M.I.A. 89. S.C., 8 Suth (P.C.) 1.
8. Mayne: P. 370.
9. Per Turner L. J. in Soorjeemony Dasee vs. Denobundo, 6 M.I.A. 553, S.C.A. 1 Suth. (P.C.), 114 (Quoted in Mayne p. 370).
10. Re Soorajmonee Dasi vs. Denobandhu, 6 M.I.A. 526, 539.
11. Some find the forerunner of Bengal system in Narada's text.

Bengal. Both the system are the offsprings of old Indo-Aryan family life. Only the latter-day legal rules of both the schools have moulded both the institutions in their present forms. Comparing the evolution of the German family system with that of the Indo-Aryans, we can surmise that as the dialectical materialistic processes of history in German society led the transformation of the pristine patriarchal system of society into the mediaeval joint-family based on right to possession by birth, and further transformations of it in the last quarter of the nineteenth century assuring every co-heir the right of alienation of his share, and also the right of dissolution of the joint-family, likewise similar dialectical forces of history must have worked in the Indo-Aryan society to transform the patriarchal family into *Samsristi* i.e. joint-family which again transformed itself in Bengal with rights of the co-heir somewhat similar to modern German Code. Again, a strange coincidence!

Another parallel is to be sought from the Chinese society. The Chinese society is patriarchal.[12] The father has got the right to divide his property among his sons. Yet according to the investigator there is a joint-ownership of family property. It is to be noted that J. D. Mayne speaks of Jimutavahana, as, "He was the apologist of a revolution which must have been completed long before he wrote. But from his writing that revolution derived the stability due to a supposed accordance with tradition" (P. 325).

12. Vide Belden: "China Shakes the world."

IX

THE VILLAGE COMMUNITY

In the middle of the nineteenth century, following the wake of Morgan's discovery of the rules of ancient society, Sir Henry S. Maine startled the intelligentsia of the world by declaring that village communities as the remnant of the ancient tribal communism exist in India. Thus he says, "The tokens of an extreme antiquity are discernible in almost every single feature of the Indian village communities. We have so many independent reasons for suspecting that the infancy of law is distinguished by the prevalence of co-ownership, by the intermixture of personal with proprietary rights,.....that we should be justified in deducing many important conclusions from our observation of these proprietary brotherhoods, even if no similarly compounded societies could be detected in any other part of the world..... The researches of M. de Haxthausen, M. Tengoborski, and others have shown us that the Russian villages are.....naturally organised communities like those of India".[1] Again he says, "the Russian village appears to be a nearly exact repetition of the Indian community".[2] But we have seen already that the *Mir* system is not regarded to be most ancient institution in Russia. The thing that concerns us here, is, his hypothesis regarding the origin of Indian village community under the basis of archaic law of joint-ownership as he supposed to have found in the Hindu law. Regarding it he says, "There is, however, one community which will always be carefully examined by the enquirer who is in quest of any lost institution of primeval society,.....It appears that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would

1, 2. H. S. Maine: "Ancient Law." pp. 277; 278.

lead us to entertain respecting the original condition of property. The village community of India is at once an organised patriarchal society and an assemblage of co-proprietors".[3]

This news of Maine has so long been taken for granted by those of the nineteenth century scholars who spun theories of Morgan and Maine that after the nomadic stage of no-property, joint-ownership has been the first stage in economic development of man, and that it is a universal truth. But the latterday investigations of Baden-Powell in India has disproved it; and we have already spoken of other recent investigations. Baden-Powell says that it is neither a universal phenomenon in Indian land system nor a primary one. He says thus: "The Indian village was not composed of a group of cultivators having joint or communistic interests but several sets of families who owned their holdings severally. There is administrative unity for many purposes, but there is no communal ownership in tenure".[4] On the other hand the Indologist Hopkins says, "This is not a 'village community', it is a joint-village. Now such village-corporations are expressedly recognised in the later law books".[5]

Then comes Tupper who after the conquest of the Punjab by the British, made an investigation about the land laws prevailing amongst the people of the province. Tupper in the course of his investigation quotes a governmental letter on the Transfer of Property Bill deated 21st January, 1878 in which the Punjab Government said: "There is in this province a large body of Native law and usage relating to landed property.....although they are not identical with Hindu law they are by no means a wilderness of single instances unillumined by any guiding principle".[6] Thus we find that there are mazes of laws and usages in the province from which we cannot cull out the original one as supposedly done by Maine. In this matter, Tupper says, "we should withhold ourselves from the belief

3. Ibid. Ditto: pp. 271-272.
4. Baden-Powell: "A Manual of the Land Revenue System." "Land Tenure in British India."
5. E. W. Hopkins: "India, Old and New."
6. C. L. Tupper: "Punjab Customary Law." Vol. I. 1881 p. 33.

that any primitive institutions we may decipher here are co-extensive with Aryan races in certain stages of progress until, in each case, the fact must be established by a sufficient examination of sufficient evidence".[7] As regards village organization Tupper further says, "I am now in a position to give some answer to the question with which I set out. Neither the theory of M. de Laveleye[8] nor that of Sir Henry Maine will exactly fit the facts, as I understand them, of this province. But the general order of progress,—the tribe, the village, the Joint-family—here asserted, more nearly coincide with the opinion of the former than with that of the latter".[9] Further he says, "The political independence of villages, of course, vanished with the days of turbulence that created and sustained it. But the village community, the tribe, and the clan, as sources of primitive law still live here in remarkable strength and preservation".[10]

In perusing over the investigations which speak of village communities of the landed proprietors having joint-interests[11] it cannot be held that these organizations are the primary form of ownership as asserted by Maine. The Panjab has had seen many revolutions and invasions since the Vedic days. Hence, one cannot find the primary stage of tribal property and the secondary stage of family property there in modern time. In this matter, Baden-Powell has said: "I think we have every right to insist that the distinct existence of a type of Indian village in which 'ownership in common' cannot be proved to be a feature, either of the past or present, should be acknowledged, and that it is hardly possible to appeal to the Indian village community as evidence in any general question of archaic land custom".[12] Further, citing the development of Java, Lewiniski quoting Eindresume (Vol. I. p. 293) says that, "the institutions of village community is of more recent origin, and was pre-

7, 9, 10. C. L. Tupper Op. cit. pp. 43; 58; 33.
8. M. de Laveleye: "Primitive Property."
11. Vide Punjab Administration Report of 1872-73 by G. S. Barkley quoted by Tupper.
12. Baden-Powell: quoted in Lewiniski. p. 30.

ceded by individual ownership".[13] Lewiniski's contention is that the pressure of population on land gives rise to village community. In reading the dictum of this investigator in the matter of periodic distribution of land which he considers as the third stage of evolution of land property, we find it existing in some places of the Punjab and the frontier districts inhabited by the Pathans. Hence, by longshot, we cannot get at the theory of Maine that joint-ownership of land or other property had been the most archaic system of proprietary law, or that village community is an extension of joint-family system.

Here we like to point out that Manu, Yajnavalkya and others who have spoken about the demarcation of arable lands among the proprietors (Yaj. II. 153-161) have not alluded to any sort of joint property in land of the cultivators. They have spoken of separate proprietorship of cultivable lands. Hence, in seeing village communities existing in some places of the Punjab in the nineteenth century, Maine arranged the facts in support of his theory of joint-ownership as the most primitive form of property relation which he found in the oldest Hindu law and in Indian village system. But this is only, a misreading of the historical facts. The existence of the type of village community as portrayed by Maine[14] cannot be attested in ancient Indian history.[15] But the fact is that there have been village communities existing in India from ancient times. The Vedic Literature speaks of village *Sabhâ* (RV. I. 91. 20. VIII. 4. 9). Again, an assembly of the tribe used to be called *Samiti* (R.V. IX. 92. 6).[16] That there had been a system of village-assembly is evinced by the titles of *Gramani,* and the village-head *Brajapati* (RV. X. 179. 2) being mentioned in the Rig Veda. Again, as late as in the time of the Sunga dynasty when Sumati Bhargava's new recension of Manu Smriti took place, we find some sort of village organization being mentioned in the text (VII. 115-118). The head of a village is called as *Gramapati* (VII. 115). It

13. Lewiniski: "The Origin of Property". p. 30.
14. Vide H. S. Maine: "Village Communities of the East and West."
15. Vide B N. Datta: "Dialectics of Indian Land System."
16. Regarding the meaning of these two terms see Jayaswal—"Hindu Polity" and P. Kane—Vol. III.

seems it has been a political organization. But the village head had the power to punish thieves and other criminals (VII. 167). Again, the pay of this village head was to be raised from the dues of the villagers to the king (VII. 118).

But in the inscriptions of North-India during the Middle Ages, we donot hear of village-assemblies at all. Yet, in the late period of Hindu history, in the tenth century A.D. we hear of village assemblies (Grâma-sabhâs) in the South during the Chola rule.[17] An interesting epigraphic record of the tenth century during the reign of King Parantaka I of the Chola dynasty, speaks of the different departments of a great assembly of a village: the Ward-committee, the Garden-committee, the Tanks-committee.[18] Further, in the Inscription No. 110 of S. I. I. Vol. II. it is mentioned that "if we fail (to act according to this discussion), we the members of the assembly shall ourselves pay a fine of hundred Kalanju of gold." From it, it is evident that the members of the village commities were responsible for all transactions of the village. Village committees of the South were recorded as late as the thirteenth century A.D.[19] But there is no trace of evidence of any sort of village assembly in the records of the latter Vijayanagara empire. Perhaps, with the rise of absolutism in Hindu monarchies, village assemblies were either suppressed or faded into oblivion. Signs of its former existence perhaps could be traced in the inscriptions of the Bengal Kings of the post-Gupta period when land was allotted by informing the notables of the village.[20] Hence, the talk of village communities existing in India bearing the impress of village communism or village proprietorship of land is a utopia. Manu, Yajnavalkya nowhere have spoken of joint proprietorship of village lands. It is a far fetched idea of Sir Henry Maine in seeing it in some of the Punjab villages of the nineteenth century.

As regards the pasture lands being the relics of village communism there is again a misreading of facts. Regarding arable

17. South-Indian Inscriptions. Vol. III. pt. 1. No. 2.
18. Ibid. No. 99.
19. Vide J. R. Pantalu in J. A. H. R. S. Vol. IV. 1920 pp. 146-154.
20. Vide B. N. Datta: Dialectics of Land Economics of India.

and pasture lands Yajnavalkya, the protagonist of the theory of 'common ownership' says, "If some animals destroy the crops of the field, the proprietor of that field is to be recompensed with proportionate payment" (II. 162-164). Again, his injunction is: "the shepherd should count the animals on returning them to the proprietor as the proprietor counts them in the morning in sending the animals to pasture" (II. 167). Finally he says, "At the request of the villagers, more or less land should be let as pasture (Go-prachara) by the command of the King—(II. 169). This aphorism implies that the land of the village belongs to the King and at the request of the villagers he sets a part of it for grazing. Hence, any sort of village communism or joint-ownership of the land of the village by the villagers is negativated by it.

On these accounts we must say that the talk of village communism existing in India as evinced by the existing village communities of some Punjab villages is a myth.

X

THE NEW EPOCH

We have said our say regarding the evolution of the present-day Hindu Law of inheritance. Originally there was an Indo-Aryan law based on custom. But in the Middle Ages after the influx of the foreign barbarians from outside and after their settlement inside the country as orthodox Brahmanists, another School of Law regarding inheritance of ancestral property took its rise. This new school based on Yajnavalkya became prominent in the eleventh century. Thus in the eleventh century A.D. we see a bifurcation in law and also in other cultural goods. Truly Ghurye has lamented that this century brought differentiation not only in law but also in costume between the Eastern and Western India. It also made differences in other social institutions as well. The juridical writers on Indian law scratch their heads to find out the origin of this differentiation. We have also seen that fantastic theories have been started to explain this phenomenon. They became myopic in their vision. But no one has had any broad perspective to find out the dialectics of Historical Materialism that has worked through the epochs of Indian history. To them, Indian history is a *Sanatana one.* Indian social history is *Nitya* i.e. permanent, to them. Hence, according to them, India had been impervious to any foreign influence. On this account any foreign influence in Hindu society is beyond their conception. It is a sacrilege to them.

The Indians being overwhelmed by repeated conquests became enslaved in mind and body. On this account, they advanced the theory that they as 'superior' people in the world, closed the pages of their history to the *mlechha* i.e. denying all foreign cultural cross-currents. Every bit of their culture is God-ordained and it is original with them. In this way they encrusted themselves and cherished fantastic notions regarding themselves and had prejudiced views regarding the outside

world. Then came the introduction of modern education in the British epoch. But the spread of English education in the nineteenth century worked on the other way. The encrusted mind became dazzled by the glare of the new light. The enfeebled mind of long-suffering enslaved people took the words of the new masters as revealed ones. There cannot be any question about their infallibility. The intellectual conquest of the Indian mind had been so complete that even a learned law-text writer with the highest erudition in Sanskrit literature explained the intrinsic Hindu religious observances, viz., *Samânodaka, Sâkulya,* etc., in terms of Sir Henry Maine's new-fangled theory on Indian society. These savants did not care to delve into the Brahmanical Smritis to find the true imports of the terms! This phenomenon has been the outcome of the "first intoxication of the West" as the Japanese poet Yone Naguchi has characterized it.

But a comparative study of Archaeology and Ethnology opens up a new vista of forgotten past of India. We find that in no period of her history India has been isolated from the outside world.[2] Indeed Indian civilization was fed by the cross-currents of different culture since the Chalcolithic age. The Rig-Veda, the revealed scripture of the Indo-Aryans had not been immune to those outside currents of cultural streams. Thus says, the archæologist Gordon Child: "Chinese and Indian civilization have indeed not failed to absorb currents from one another and from further West. But hitherto discharged these into placid unchanging backwaters".[3]

Again, the finding of Anthropology is that different ethnic groups have been living in India since Palaeolithic Age. These have never been coalesced into a homogeneous unit, though there had been interactions of the cultures of the different groups since the Rig-Vedic days. And this process of interaction is still going on. It is apparent that amongst the ethnic cultural units that have been existing in India since old times, the Indo-Aryan

1. M. Panikkar, "Asia and Western dominance". p. 506.
2. V. G. Childe, "What happened in history."
3. Do. Do. p. 24.

unit has gained the upper hand. To-day, all the Indian peoples calling themselves *Hindus* are governed in all cultural matters by the injunctions emanating from the Vedic Literature. All their institutions have their sources in the Rig-Veda.

In scanning the Vedic Literature we find that all the social and religious customs and rites mentioned or hinted at in the Rig-Veda have been elucidated in the Brahmanas, Srauta-and Grihya-sutras. From these texts we find that the customs of the Indo-Aryan tribes have been explained in them. Indeed, Asvalayana in his "Grihya-sutras" says in the matter of marriage that, "various customs are prevalent in various localities. Amongst these, those that are common I put down here."

But as regards legal customs we do not get any inkling till we come to Gautama's Dharma-sutras written perhaps about the Mauryan epoch. From that time onward, we find discussion about *Dâya* (Inheritance) in the texts called in contradistinction to the *Sruti* (Veda) as *Smriti*. From Gautama down to Muhammedan period there have been vissicitudes in the Smriti-injunctions in the matter of law. We have seen about it in our previous discussions about *Dâya*. There have been changes, divisions and adaptations according to localities. Accordingly, there is no uniform law among the Hindus taken as a whole. Custom as the force of law prevails in good many places and in classes and in families.

Taking this fact in our perspective, we do not find the claim of Hindu law as a "revealed one" is being substantiated by any text. The Smritis which deal with *Vyavahâra* (law) have got no binding force as a revealed scripture. The Sruti as the Veda is honoured as the revealed scripture and it is the final authority. The Sruti comprises the *Samhitas* of the four Vedas and their exegetical texts known as *Brahmanas*. But their is no discussion of *vyavahara* or its part, *Dâya* as such, in them.

But when the Smritis appear in post-Buddhist period containing discussions on law, we must take it for granted that these are the echoes of customs prevalent among the Indo-Aryan tribes. Of course, apart from mentioning the custom of the tribe or the local people, personal opinion or bias of the author of the text cannot be waived aside from the injunctions.

That Indian law is based on primordial Indo-Aryan custom as attested by the fact that in many points it shows its similarity with those of some of the Indo-European peoples of antiquity. We have discussed about it previously. Hence, the claim of cut and dried revelation of Hindu law cannot be entertained. The claim of revelation of Veda itself is a case of long-drawn growth. The Purva Mimamsa of Jaimini brought the finality of the claim in Circa 200-400 A.D. But the oldest of the Smritis is that of Gautama which is regarded by some as written arter Alexander's invasion. Gautama has mentioned the *Javanas*, and has ascribed to them a fantastic origin! Hence, there is no room for acceding to the claim that the legislation of the Smritis is a revealed injunction. Further, Smriti which means 'remembrance' cannot be used to denote a revealed matter. Kautilya in his Arthashastra has mentioned many of the customs which are legally binding. Some of them are at variance with the Smriti-legislations. The Smriti legislations as pious wishes of the priesthood are ideational only and cannot have any legal binding unless accepted by the State. On the other hand, as acknowledged by Kamandaka, the 'Arthashastra' of Kautilya was the guide-book to the imperial government of the Mauryas. The state-force gave sanction of legality to *Arthashastra* which became the Maurya imperial code. Indeed, Kautilya's text gave rather truer version of Indian society and its customs than the class-biassed *smritis* which were written from the ideational plane.

The laws of any historical people have been originally based on tribal custom. Religious sanction was ascribed to them later on. The laws of ancient Persia and of Moslem-Arabia have also been primarily based on previous tribal customs. State interference brings modifications or innovations to the original form. But the claim of revelation and unchangeableness of a given law is the cry of the vested interest of the priesthood or of a given social group. Anthropology says, that with the progressive development of a given ethnic group, the cultural institutions of that unit change *pari passu* the economic development to a higher stage of civilization. As such, we cannot pin down law to a particular position for any length of time. In that case, stagnation will set in to that civilization.

Thus, keeping the historical perspective before our eyes, we see that the claim of Hindu law as a revealed one has got no leg to stand upon, especially when Vijnaneswara and his school argue that law is *secular*. The very thesis of this school which has got wide ramifications all over the country cuts at the root of the conservative priestly claim of revelation. Again, if legal provisions do not change to give wider mobility to the institutions that concern the vital interests of the society, then that social unit is sure to enmesh itself into the morass of stagnation. This arrests the farther growth of the society towards progress. We have seen that the modern history of Europe tells us that in the nineteenth century, the countries that came out of feudalistic stage and social conditions either through revolution or otherwise, had changed their mediaeval laws to modern laws based on rationalism and equity to suit the exigency of new socio-economic development. In the twentieth century Russia, after a socialist revolution, had changed her old law as well.

Today, India, that is Bharat, is an independent sovereign democratic Republic. Her constitution provides her the scope of development along the line of bourgeois-democratic civilization. The national Government is trying with a neck-break speed to bring up India to high industrial level. The time is coming when the phase of Third Industrial Revolution will play its role in Bharat. But her society is as yet on feudalistic basis. Her laws are still more ancient. Primordial customary laws, feudal laws, and tribal laws are still in force in the country. The vested interests cry hoarse over the sanctity of the Hindu law. They do not see that society is changing faster than they imagine. Society in India is transforming itself along with political and economic changes. With the complete industrialization of the country coupled with republican democracy, Bharat that is remaking herself will be changed to one beyond recognition in near future. From the priestly *Ramarajya* ideal of the Ramayana to democratic republic of Bharat is a far cry! But Manu and Yajnavalkya with their tribal and feudal legal institutions are indescribable anachronisms that sit as 'incubus' on the body-politic of India. The time-lag between the mediaeval Smriti-legislations and the legislation of democratic republican Bharat is not yet

within the understanding of the intelligentsia. The fate of Rao Bill or so-called "Hindu Code Bill" betrays the moribund mentality of the representatives of the people. The idea of the change of the Indian social institutions according to the time-spirit which is the desideratum for its progress, is a nightmare to the wiseacres who act as the leaders of the society. The piece-meal reforms that are being enacted in the Indian Parliament are not the desiderata. They have not yet been weaned away from the Sanatanabâd of the feudal Age. The tactics of defence for survival which actuated the Indians since the early days of foreign invasion which thereby made them forget the past, have made them think that the epigenous growth on the body-politic of India, are really the hallowed conditions since the Rig-Vedic period. On this account, the Pharisees of the Hindu society fought tooth and nail against the prohibition of Sati-System, abolition of child-marriage, widow remarriage, Consent Age, etc. They never cared to enquire either from the religious texts or from the actual working of the society the truth about this epigenous institutions. They never cared to find out that the burning of the widows on the funeral pyre of their husbands was not mentioned in any of the Sruti or Smriti texts; that widow-remarriage has been the normal order of the society, that it is still the fashion with those layers of the society that are not much Brahmanized in their habits, that the Smritis have got provisions to safe-guard the evil of child-marriage, that the taboo restrictions about food and drink are but dead letters, that customs regarding marriage, food and drink vary in different localities. They never cared to find out what the earliest legislator Manu has said regarding food and drink. Their whole assumption regarding Hindu social institutions is based on class limitation and amazing ignorance of their own history thus generating blind and colossal prejudice against any innovation. Priestcraft has dwarfed their intelligence and vision. Long served slavery has stunted their normal outlook of life.

In occidental countries every political revolution has been preceded by an intellectual revolution. A galaxy of intellectual seekers of truth who put every institution of their countries to searching enquiry, has appeared first on the intellectual plane. The revolu-

tionary fight was first carried on the intellectual *niveau* then the fight descended to political plane. This gave rise to socio-economic transformations which distinguishes modern Occident from the tribal and mediæval Orient.

In India, there never have been a free enquiry of the institutions since the days of the spread of the modern educational system. The so-called Renaissance arose as a reaction against the foreign Christian missionary onslaught, In fact, the reform movements were new form of window-dressing of the society vis-a-vis the attacks of the foreigners. A revolutionary thought which puts into fire the structure of social polity and probes about its utility is unknown in modern India. Moreover, the rising tide of nationalism that gradually engulfed all other movements set free enquiry at naught. Further, at that time, it used to be said in answer to the obstreperous enquirer demanding the delineation of the nature of freedom that is being sought, that millenium would come after the attainment of freedom. As a result we lacked that free and searching enquiry that characterized the thoughts of the French Encyclopædists, the German and Russian revolutionists. The aftermath is present-day intellectual torpor and stagnation of political life. The thinkers of Bharat and the seceded portion named "Pakistan" think in terms of mediæval ideologies. "Ramrajya" has been the shibboleth of our national leaders, "Islamic Theocracy" the slogan of the Moslem section.

Whether as Hindu nationalist or Muhommedan communalist all have the mediæval ideologies dangled before their eyes. They forget the time-lag that has intervened between the sixth or seventh centuries A. D. and the modern period with experiments of atomic energy. These revivalists in their *furor* of prejudice and intellectual bankruptcy, forget that India or Asia in general cannot go back to the sixth or seventh century institutions. Their shibboleths may be catching slogans to enmesh the ignorant and fanatic masses in the cobwebs of their vested interests, but the dialectics of Historical-Materialism grinds its way unfailingly towards a new synthesis. The examples of Peoples' Governments in Eastern Europe and in China are warnings to these representatives of Indian and Pakistani Vested Interests. Of course, the

prejudice of the vested interest dies hard, but die it must, sooner or later. The post-war Japan is a brilliant example of it. Japan remodelled her political institutions but feudalism reigned supreme in the State. At last, under the aegis of the foreign conquerors, a new law intended to change the whole structure was passed.[4]

Asia of to-day is in travail. A new Asia is emerging out of her tribal and feudal incrustations. Naturally it takes time to break-out of the hard shells. But the more the enclosures are hard to break through the more violent is the outburst. The Western Europe of the eighteenth and nineteenth centuries and Russia, Turkey and China of the twenteith century are examples of it. Where there are wise leaders and intelligent followings, the struggle of travail of a new birth is not so poignant.

To-day, the task before the people of the free Indian continent is whether to remain in the old moribund state of society for the upkeep of the interests of an elite few, or to ensure the happiness of many, the good of many. To-day, the slogan of the radical thinkers of the advanced countries is that every man in the society must be well cared for and be given opportunity to develop to his utmost capacity. Hence, the society needs an overhauling. There is no gainsaying about it. The Indian society cannot be made the happy hunting ground of a handful of exploiters.

We have said that every old nation after getting its rejuvenescence has completely remodelled its law and the institutions emanating from it. Independent India awaits it. It is imperative that the free Indian people should develop their capacity of life's work for their own betterment. As a means to this end, a thorough overhauling of the Indian legal system is imperative.

It has been discussed already that law is based on custom. But in a society which is dynamic, custom does change. Transformation to suit the exigency of the time is the sign of life. Hence, we do not forget that Smriti-legislations to guide the life of a

4. Vide John Gunther: "The Riddle of MacArther." p. 114.

Hindu do not have their old applications any longer. The British-Indian Courts and the British Privy Council have modified the applications of the Smriti-legislations to a great extent. The decisions of the Courts are cited as precedents to guide later judgments. These technically are called *case-laws*. Again, both the schools of Hindu law have been made to converge towards one another. Hence, the Hindu law is not in its original purity and position. But apart from this fact, a rejuvenated people needs the reconsideration of its social structure. The old evils cannot be allowed to remain where they are. The social-polity of the Indians who have shown their race-capacity by the achievement of freedom and thus have got a new base of life, needs a reconsideration of her institutions. But the basis of a social polity in a primitive society is custom, in a civilized community its law. On this account, the legal institutions extant in India need remodelling.

Now the question comes, what is law in reference to a civilized community The celebrated American jurist Roscoe Pound says, "I am content to think of *law* as a social institution to satisfy social want—the claims and demands involved with the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society".[5] This being the modern definition of law, we see that it hinges around property in the matter of inheritance. Again, it directs the relation of social beings to one another and satisfies the social demands. Hence, it is social-utilitarian in its finality. Again, J. Kohler, the leader of the school for comparative study of law, regards the development of law from the stand-point of ethnology. He, as a neo-Hegelian regards law as a cultural phenomenon. He rejects hedonistic view in the matter of law as he says, "The world does not exist for our pleasure".[6] The culture of a people, he says, determines the development and form of its laws. Hence it must be said here that conversely the law of a given group of

5. Roscoe Pound: "An Introduction to Philosophy of Law" p. 99.
6. Vide Kohler: Recht, Glaube und Sitte (in Gruenh 1892, Vol. 10).

people is an index of its culture. In this matter, Kohler says: "The requirements of the law are the requirements of culture. The law must be so constituted that it may in the greatest degree conform with culture. It must aid in developing the seeds of culture and repressing the elements that are contrary to it".[7]

Thus we have quoted the sociological school of law as well as the anthropological one, to show that law is a social institution that serves social purpose and can be improved and changed by the State. Again, the law has got the right to repress the elements that are not conducive to growth of culture i.e., human progress. Hence in a cultural community law is always *becoming* and not a permanent (*nitya*) one of Nature or revealed as the mediæval scholastic jurists claim.

This being the definition of law and its function, we should put the Indian laws: Smriti-legislation and customary one to belong to the domain of anthropology. The sociologists put the so-called Hinduism in the class known as "anthropological religion." This means that the origin and the growth of the religion of the Indo-Aryans stand in direct relation with the ethnic growth of the same people. It has not emanated out of artificial creed and dogmas. Each stage of development of the Indo-Aryan people has left its mark in its culture and religious beliefs. At the same time, we trace the growth of the legal system *pari passu* the growth of the people. Thus Hindu legal system is primarily based on ethnic development of the people called "Hindus" since the Turkish conquest of North-India. As such, the system could be changed and it did change before any foreign invasion took place. Truly Kohler has said: "The process of the formation of the law can be understood only as part of the general development of a people".[8] On this account, when the freed Indian people is rejuvenating itself, the legal system as an index of its new phase of culture has got to be readjusted to suit the needs of the new society in making. The hard-earned

7. Josef Kohler: "Philosophy of Law." Translated by A. Albrecht 1914 p. 58.
8. Kohler: "Recht, Glaube und Sitte." pp. 568, 611.

freedom has got to be assured to all. Thus, in tracing the legal freedom in the course of European history Berolzheimer says, "The original problem of legal philosophy, that Roussean formulated and Kant accepted, was not the manner of association of the community through law and government, but as an expression and as a guarantee of individual freedom. This problem now demands a re-statement in consideration of the altered economic conditions and intellectual outlook. The present-day interests sound a note of warning to the effect that the emancipation of the upper classes, must not permit the intellectual gains which the European civilization has achieved since the days of the Reformation, to be placed at the mercy of the powers of darkness".[9]

How true it is in the case of Bharat and Pakistan! Hence, the freedom achieved must be applied to every phase of life. It must be experimented upon to see the effect of it on society. In this matter, the American writer Beutel says: "A science of law based on a rigorous application of the scientific method should be devoted to the study of the phenomenon of law making the effect of law upon society, and the efficiency of laws in accomplishing the purposes for which they come into existence".[10] From the claim of law as revealed something to the talk of scientific experimental jurisprudence is a far cry. In India as yet it is unthinkable. Yet the new light must penetrate the cimmerian darkness created by the vested interests in the name of religion. Hence, we hear from the same writer: "A system of experimental jurisprudence in its complete workings would not necessarily be limited to studying the efficiency of various legal devices in accomplishing their purpose. It could also throw considerable light on the value of the purposes them-

9. Fritz Berolrheimer: "The World Legal Philosophies" Translated by R. S. Jastrow. 1924 p. 477.
10. Frederick K. Beutel: "An Outline of the Nature and Methods of Experimental Jurisprudence" (Reprinted from Columbia Law Review. Vol. 51. p. 415. April 1951) p. 425.

selves".[11] Thus, a blind faith in holding fast to 'what our ancestors have done' is extremely pernicious to the social body-politic. Again, the same writer says, "There is every reason to believe that here and in many other fields scientific jurisprudence could become the instruments of experimental ethics in developing a new and finer civilization".[12]

This is the state of jurisprudence which is regarded as an experimental science. But in India.....?

Now coming back to Hindu law, it must be emphasized that the democratic-republican Hindu citizens of India must be freed from the tribal law of inheritance as provided in Mitakshara. At the same time, those who are governed by the legal system of Dayabhaga must be freed from the priestly mediaeval incubus. The law of inheritance deals with property of the family. In a modern world of international intercourse, and when a homogeneous nationhood is in the making, clannish law of inheritance of property cannot be entertained. Roscoe Pound quoting Duguit said, that "he has shown clearly enough that the law of property is becoming socialized" in the modern world.[13] Duguit himself said: "in modern communities the economic need which was answered by the law of property is undergoing a profound alteration. Here too, the evolution is in a social sense; its direction is being determined by....inter-dependence of the various elements that compose the social community. In this way property is socialized, if I may use the term. Private ownership is ceasing to be private right and becoming a social function".[13B] It is extending its property-right by widening its portal. Property has got social-utilitarian value, hence in modern time it is getting more and more socialized. The dialectics of time demand that property in order to be of service to larger numbers must come out of its agnatic, that is, clannish limitation.

In the twentieth century the question that has arisen is, that property either must be at the service of the larger number of

11, 12. Ibid. Op. cit. pp. 435, 437.
13. R. Pound: Op. cit. pp. 233-234.
13B. Leon Duguit: "Changes of Principle in the field of Liberty, contract; Liability and Property" in continental Legal History Series, p. 129, 1918.

persons of the society or it must be completely socialized. The Socialist Soviet Repubic of the European continent has abolished property as private interest. It is a sign of the time. Those who have eyes can see it. They must come out of their mediaeval moorings. The citizens of a democratic republican State like that of Bharat must come out of their feudal trappings and put on a new garb that will give them wider mobility. For these reasons our contention is that the Indian legal systems must be thoroughly remodelled so as to give scope for the forward growth of the new Indian nation. Our intellectuals must wean their minds away from sectarianism, bigotry and attachment to the past and see that commensurating the growth of nationhood a new legal system applicable to all the citizens takes its place. Long ago Ram Mohon Roy, the prophet of New India arrived at this idea. With the birth of the Renaissance of India he perceived that to form a homogeneous nationality in India, the unification of the law of inheritance of the Hindus and of the Moslems is one of the things wanted most.[14] Indeed we have seen that the Ishmaelite sects of India and other Moslem groups in Guzerat are governed by the law of Mitakshara in the matter of inheritance. Again, the rural Muhammedan peoples of the Punjab and the Pathans of N. W. F. Province now included in West Pakistan, are governed by customary laws of their own. Hence it is clear that Shariat Law has not been binding on them.

We have previously seen that the Islamic Shariat law is not binding in the same way on all the Moslems of the world. The Shiahs of Persia have clung to their ancient Zoroastrian custom in the matter of giving proprietary right to the cognates. The Turkish Republic under Kemal Pasha has abolished Shariat law and has introduced a new legal system in the country. Indeed the old tribal Arab law cannot be applicable to modern commercial and industrial peoples. Tribal and mediaeval laws act as deterrants to the growth of modern nationhood. The Moslem

14. Nagendranath Chattopadhya: "Life of Ram Mohon Roy" (in Bengali).

intellectuals in Bharat and outside must ponder over the problems to ensure their forward march in history.

Ram Mohon Roy also pleaded for the fixation of a Penal Code in India. Of course, at a later period an Indian Penal Code was framed and introduced in the whole of India under the then the British rule. But it seems that the Indian Penal Code and its corollary the Jail regulations are copied from the British system. But both these systems are based on the primitive principles of *Lex Talionis,* that is, "eye for eye, tooth for tooth".[15]

It is said that the National Government of India is contemplating the reform of the existing Penal Code. But on what basis it is not known. The criminal law of a civilized and progressive State cannot be based on *Vaira-deya,* that is, fine on blood-feud and an "eye for eye and tooth for tooth" policy. The Indian Courts have not as yet accepted the modern methods of criminology to ascertain a crime. The science of Psychiatrics are not yet applied to detect a crime. The jails are nothing but factories to be worked by the prisoners just as slaves used to work in the Roman Latifundia or American plantation.[16] In fact, the Indian Penal Code as drawn by the quondam foreign rulers is not the Code of a civilized State and the Jail Code, again, is copied from the English one. The Penal Code and the Jail Regulations are not conducive to the character reformation of the supposed criminal. The Indian jails are not reformatories.

Taking all these things into consideration in independent India, the desideratum is that a commission composed of jurists with knowledge of international legal systems and their workings be appointed to go through the legal situation of the present-day Bharat, and to remodel laws on the basis of rationalism, liberty and

15. The writer has got personal experience of the both, heice he knows what he says here.
16. The writer has got experiences in several central Jails and sub-Jails as a political prisoner. Indeed he himself had to work as a slave,—a human automaton with no human sympathy extended to him. Lex Taliones works in Indian criminal laws and in jails. The belief of many of the convicted prisoners as expressed to the writer was that 'in order to work the jail factories of the Government by slave labour, innocent persons are convicted by the Police'.

equity. Social utility leading to the greatest good to the largest number should be the motto of the new legal system. Bigotry and fanaticism cannot lead a modern State towards advancement. India in the past had experiences of these attitudes of the mind. The hour-hand of the Indian clock of advancement cannot be set back by the above-mentioned methods.

The Indian constitution has provided for the development of India on bourgeois-democratic line. A new language as the *Lingua-franca* is being thrust on the people with the idea of creating homogeneity in the formation of nationhood. But law as one of the fundamental factors of homogeneity is side-tracked. It hurts the time-old vested interests. But the uniformity of the legal system is imperative for the national homogeneity. It is one of the functions of Indian bourgeois-democratic evolution. If the present-day leaders who pose themselves as the representatives of the people donot see their way in remodelling the legal system, the next generation is sure to envisage it in their programme of reconstruction. It is a question of time when the newer generation imbued with newer outlook of nationhood will do away with the wreckages of the past and put India on her proper pedestal sighed for so long by many a patriot.

THE END

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